Supreme Court, U.S.
FILED

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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

GLORIA TURNER WILKES,
Petitioner,

v.

LEGRAND YOUNG, INDIVIDUALLY AND AS AGENT AND IN HIS OFFICIAL CAPACITY OF THE COUNTY OF FLORENCE;
THE COUNTY OF FLORENCE, SOUTH CAROLINA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

R. Bryan Harwell
Harwell, Ballenger & DeBerry
Post Office Box 107
Florence, South Carolina 29503
803-662-6301

Attorney for Petitioner

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QUESTIONS PRESENTED FOR REVIEW

1. Did the appellate court fail to apply the proper standard on review, in that the court did not inquire whether the evidence was legally sufficient to support the jury's resolution of the probable cause issue, but rather impermissibly reexamined the facts found by the jury, thereby deviating from the normal review standard accepted by other circuit courts of appeals?

2. Did the appellate court, in reversing the judgment, misapprehend the law of probable cause as applied in the context of the facts in this case and as established by the precedent of this Court and the precedent of the courts in other circuits?

3. In reversing the judgment in favor of the Petitioner on her "outrage" state tort cause of action, did the court overlook material facts, impermissibly substitute its view of the evidence for that of the trial court, and misapply the common law and statutes of South Carolina?

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit is reported at Wilkes v. Young, 28 F.3d 1362 (4th Cir. 1994). A verdict was entered in the District Court for the District of South Carolina in favor of the Petitioner on July 21, 1992 (App. A-83-84).[1] No written opinion was rendered in the District Court.

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[1]Throughout this petition, the designation "App." refers to the Appendix bound with the petition; the designation "J.A." refers to the Joint Appendix filed in the Fourth Circuit Court of Appeals.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, 28 U.S.C. § 1331, and the court's supplemental jurisdiction, the Petitioner filed this action in the United States District Court for the District of South Carolina on October 24, 1991. On July 21, 1992, a verdict was entered in favor of the Petitioner on her claims under 42 U.S.C. § 1983 and under South Carolina law. On July 12, 1994, the United States Court of Appeals for the Fourth Circuit, in a two-to-one decision, reversed the judgment. Wilkes v. Young, 28 F.3d 1362 (4th Cir. 1994). Wilkes filed a petition for rehearing and suggestion for rehearing in banc. On September 19, 1994, the petition for rehearing was denied, with one judge voting in favor of the petition, one judge vot-

ing against the petition, and one judge not voting. The suggestion for rehearing in banc was denied in a six-to-six decision, in which the dissenting member of the panel was not permitted to participate (App. A-83-84). The jurisdiction of this Court to review the decision of the Fourth Circuit Court of Appeals is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

S.C. Code § 17-15-90. Penalties for failure to appear after release.

It is unlawful for a person who has been released pursuant to Sections 17-15-10 through 17-15-100, to wilfully fail to appear before the court

as required. A person who violates the provisions of these sections, upon conviction, forfeits any security given or pledged for his release and is guilty of a:

(1) felony if he was released in connection with a charge of felony, or while awaiting sentence after conviction. The person must be fined not more than five thousand dollars or imprisoned not more than five years, or both.

(2) misdemeanor if he was released in connection with a charge of misdemeanor. The person must be fined not more than one thousand dollars or imprisoned not more than one year, or both.

S.C. Code Ann. § 56-5-20. Only vehicles operated upon highways governed chapter; exceptions.

The provision of this chapter relating to the operation of vehicles refer exclusively to the operation of vehicles upon highways, except:

(1) When a different place is specifically referred

to in a given section; and

(2) That the provisions of Articles 9 and 23 shall apply upon highways and elsewhere throughout the State.

S.C. Code Ann. § 56-5-710. Powers of local authorities.

Subject to the limitations prescribed in § 56-5-930, the provisions of this chapter shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from:

(1) Regulating the standing or parking of vehicles[.]

S.C. Code Ann. § 56-5-730. Required obedience to traffic laws.

It is unlawful and, unless otherwise declared in this chapter with respect to par-

ticular offenses, it is a misdemeanor for any person to do any act forbidden or to fail to perform any act required in this chapter.

STATEMENT OF THE CASE

The Petitioner, Gloria Wilkes, sued the Respondents, County of Florence, South Carolina ("the County" herein) and its Director of Buildings and Grounds, LeGrand Young ("Young" herein), in Federal District Court for the District of South Carolina, alleging a cause of action under 42 U.S.C. § 1983 and seven supplemental causes under South Carolina tort law. The Petitioner's claims all arose from her arrest for failing to appear in court after her daughter had found a homemade "parking summons" on the windshield of the Petitioner's car. A jury returned a verdict for Wilkes on her § 1983 claim and one of her state law claims, awarding damages in the sum of $40,000 against Young and the County, and further awarding punitive damages of $7,500 against Young alone.

Young and the County appealed the judgment against them. On appeal, a panel of the United States Court of Appeals for the Fourth Circuit, in a two-to-one decision, reversed the judgment. Wilkes v. Young, 28 F.3d 1362 (4th Cir. 1994). Wilkes filed a petition for rehearing and suggestion for rehearing in banc. On September 19, 1994, the petition for rehearing was denied, with one judge voting in favor of the petition, one judge voting against the petition, and one judge not voting after having recused herself from further participation in the case. The suggestion in banc was denied in a six-to-six decision, in which the dissenting member of the panel was not permitted to participate (App. A-83-84). The Petitioner now seeks a Writ

of Certiorari to the Fourth Circuit Court of Appeals decision.

The facts as established in the trial court are as follows. On or about October 17, 1989, the Petitioner's daughter drove the Petitioner's car to the Florence County Public Service Building in order to obtain emergency help that was being offered there during the time of Hurricane Hugo. While there, she apparently parked the Petitioner's vehicle in a fire lane. When she returned to the car, she found a white piece of paper, partly handwritten and partly typed, which purported to be a summons and directed the owner to appear in Magistrate's Court (J.A. 115).

The piece of paper left on the windshield of the Petitioner's vehicle, although captioned a "summons" and direct-

ing the owner of the car to appear in Magistrate's Court at a certain time, did not look like an official summons. As the dissent noted, the document "was handwritten on a piece of plain white paper, rather than being typed on a standard printed summons form, and it was signed by an employee of the County Buildings and Grounds Department, rather than by a judge or a police officer" (App. A-51). Although Petitioner's daughter had told her she had found this piece of paper on her car, she never actually saw the document, but directed her daughter to "call the Magistrate's Office and make sure everything is alright" (J.A. 34, 37). As a result of conversations that took place with a Deputy Sheriff and with the Magistrate's Office, the Plaintiff and her daughter were sat-

isfied that what was placed on the vehicle was not a legitimate ticket, and that they should therefore disregard it (App. A-51; J.A. 35).

On November 13, 1989, the Petitioner, a grandmother, registered nurse, and law-abiding citizen who had never before been arrested, was arrested without warning at the nursing home where she had worked for more than 12 years (J.A. 35). She was then taken to the local jail, where she was fingerprinted, photographed, and confined in the jail's "holding tank" for four hours, during which time she cried uncontrollably, was nervous, embarrassed, and suffered from chest pains (J.A. 36-38). Also during this period of confinement, the Petitioner suffered humiliation from the taunts of fellow inmates and significant physi-

cal harm resulting from the exacerbation of preexisting diabetic and coronary conditions, before her employer managed to obtain her release by posting bond (J.A. 36-38).

The arrest was made under a warrant specifically charging the Petitioner with violating S.C. Code Ann. § 17-15-90 (1985 & Supp. 1993), which pertains to a willful failure to appear in Magistrate's Court following arrest and release on personal recognizance. As the majority in the court of appeals recognized, this statute did not involve conduct chargeable to the Petitioner since she had not been earlier arrested and released on recognizance (App. A-5 n.1). The sole basis for the warrant was an affidavit signed by an employee of the Florence County Buildings and Grounds Department,

LeGrand Young, which stated that Mrs. Wilkes had "fail[ed] to report to Magistrate Court as required by a Summons that she received . . . for Parking in A Fire Lane" (J.A. 116). The evidence showed that Young had signed this affidavit in blank, permitted a secretary to complete it as she saw fit, and authorized her to submit the affidavit to the magistrate as his sworn testimony, without bothering to read what she had written (J.A. 65, 87-88).

The affidavit, as completed by the secretary, contained several statements that were materially false or misleading, most critically the statement that Mrs. Wilkes had been properly served with an official summons to appear in court (J.A. 65). The undisputed evidence at trial established that the only notice that

Mrs. Wilkes was ever given of her alleged obligation to appear in Magistrate's Court was contained in the crude, home-made parking ticket left on the windshield of her car when her daughter parked it in front of the Florence County Social Services Building while her daughter was attempting to obtain disaster relief following Hurricane Hugo (J.A. 34-37).

Ultimately, the charges that were made against the Petitioner were dismissed by Chief Magistrate William E. McLeod, who determined in the course of an informal pretrial investigation of the charges, that the information contained in Young's affidavit had been materially false and misleading, and that there was, in fact, no probable cause to prosecute Mrs. Wilkes for the offense charged in

the warrant on which she was arrested (or, for that matter, for any other criminal offense) (J.A. 41).

The Petitioner subsequently filed this action under 42 U.S.C. § 1983 against Young and the County of Florence, alleging that they had caused her to be arrested without probable cause, in violation of her fourth amendment rights. The case was tried to a jury, who found, under proper instructions as to which no challenge was made on appeal, that the Petitioner had in fact been arrested without probable cause, and that Young and the County were liable for this wrong under § 1983 (App. A-81-82).

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS FAILED TO APPLY THE PROPER STANDARD OF REVIEW, IN THAT THE COURT DID NOT INQUIRE WHETHER THE EVIDENCE WAS LEGALLY SUFFICIENT TO SUPPORT THE JURY'S RESOLUTION OF THE PROBABLE CAUSE ISSUE, BUT RATHER IMPERMISSIBLY RE-EXAMINED THE FACTS FOUND BY THE JURY, THEREBY DEVIATING FROM THE NORMAL REVIEW STANDARD ACCEPTED BY OTHER CIRCUIT COURTS OF APPEALS.

In Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 485 (1933), Justice Brandeis cautioned that "[a]ppellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's verdict." It is thus well established that the weight of the evidence and the credibility of witnesses is solely within the province of the jury. A&G Stevedores v. Ellerman Lines, 369 U.S. 355, 358-59 (1962); Lavendar v. Kurn, 327 U.S. 645,

652-53 (1946). These admonitions were clearly ignored by the majority in the case at bar.

In the instant case, the panel of the Fourth Circuit Court of Appeals appears to have grafted the standard of review normally applied to a trial judge's determination of probable cause in a suppression hearing onto the well-established standard of review for civil actions alleging arrests without probable cause. In the criminal setting, the determination of probable cause is an issue for the judge. In a civil action, however, the overwhelming majority of federal courts considering the issue have held that the seventh amendment requires that if the evidence is legally suffi-

cient, the probable cause issue is one for the jury.[2]

In the case at bar, the Respondents did not raise any objection to the instructions given, and an examination of the probable cause instruction indicates that it is virtually identical to the definition of probable cause set out in the majority opinion in this case (App.

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[2]See McKenzie v. Lamb, 738 F.2d 1005, 1007-08 (9th Cir. 1984) (Kennedy, J.); Deary v. Three Un-Named Police Officers, 746 F.2d 185, 190-92 (3d Cir. 1984); Patzig v. O'Neil, 577 F.2d 841, 848 (3d Cir. 1978); Reeves v. City of Jackson, 608 F.2d 644, 650 (5th Cir. 1979); Lester v. City of Chicago, 830 F.2d 706, 714-15 (7th Cir. 1987); Giordano v. Lee, 434 F.2d 1227, 1230 (8th Cir. 1970), cert. denied, 403 U.S. 931 (1971); Stringer v. Dilger, 313 F.2d 536, 541 (10th Cir. 1963); DeLoach v. Bevers, 922 F.2d 618, 623 (10th Cir. 1990), cert. denied, 112 S. Ct. 65, 116 L. Ed. 2d 41 (1991); see also Llaguno v. Mingey, 763 F.2d 1560, 1565 (7th Cir. 1985) (en banc) (Posner, J.) (applying same rule for existence of probable cause to search); B.C.R. Transport Co. v. Fontaine, 727 F.2d 7, 10 (1st Cir. 1984) (same).

A-11, 33). As the dissent in the instant case noted, if a properly instructed jury has found that the plaintiff was in fact arrested without probable cause, the court of appeals may not, under the normal review standard, set aside that finding for evidentiary insufficiency so long as the evidence adduced at trial, viewed in the light most favorable to the plaintiff and drawing all reasonable inferences in her favor, would permit a reasonable jury to reach the same conclusion (App. A-31); see also Lester v. City of Chicago, 830 F.2d 706, 714-15 (7th Cir. 1987) (applying this standard in affirming jury verdict for § 1983 plaintiff on claim of arrest without probable cause); DeLoach v. Bevers, 922 F.2d 618, 623 (10th Cir. 1990) (same), cert. denied, 112 S. Ct. 65, 116 L. Ed. 2d 41 (1991);

Stringer v. Dilger, 313 F.2d 536, 541 (10th Cir. 1963) (applying same standard in reversing JNOV for defendant on § 1983 claim based on arrest without probable cause); Patzig v. O'Neil, supra, 577 F.2d at 848 (applying same standard in reversing directed verdict for defendants on § 1983 claim based on arrest without probable cause).

In making the determination regarding probable cause, the jury was bound to consider only the information that was before the magistrate at the time he issued the warrant under which the arrest was made. 1 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 3.2(d) at 575-7 (2d ed. 1987). That information was contained entirely within the affidavit which Young had signed in blank. The only facts in the affidavit

presented to the magistrate were that the Petitioner had "failed to report to Magistrate Court as required by a Summons that she received on 10/17/89 for Parking in A Fire Lane . . . in the Parking Lot of the Florence County Public Service Bldg" (J.A. 116).

It is clear that the jury did not accept as true the factual averments in Young's affidavit. Having heard the testimony of Young and other witnesses, it was within the province of the jury to judge the credibility of Young regarding the statements made in his affidavit. As the Fifth Circuit Court of Appeals noted in a similar § 1983 case, "the question of a witness's credibility is the purest of jury issues." Hindman v. City of Paris, 746 F.2d 1063, 1068 (5th Cir. 1984).

Even if they had accepted those facts as true, however, the facts simply do not present reasonable grounds to believe that the Petitioner had committed any criminal offense recognized under South Carolina law at the time of her arrest. The section of the South Carolina Code referred to in the warrant, § 17-15-90, makes it a criminal offense to "wilfully fail to appear" in court as required following arrest and release on personal recognizance. The affidavit contains no facts which would indicate that this section could be applicable.[3]

It is therefore clear that instead of being "slow to impute to [the] jury a

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[3]The appellate court's misapprehension of the law of probable cause in the context of this case, and the effect of this misapprehension on the court's assessment of the sufficiency of the evidence is more fully discussed in Part II, infra.

disregard of [its] duties," the court of appeals refused to give the trial court decision any deference whatsoever. As the discussion in Part II, infra, shows, the appellate court substituted its own view of the evidence for that of the jury, relied on information not presented to the magistrate or the jury, and essentially conducted a de novo review of issues correctly left to the jury.

2. IN REVERSING THE JUDGMENT, THE APPELLATE COURT MISAPPREHENDED THE LAW OF PROBABLE CAUSE AS APPLIED IN THE CONTEXT OF THE FACTS IN THIS CASE AND AS ESTABLISHED BY THE PRECEDENT OF THIS COURT AND THAT OF THE COURTS IN OTHER CIRCUITS.

In reversing the judgment of the trial court, the appellate court misapprehended the law of probable cause in two crucial respects. First, the court ignored the well-established rule that

only information before the magistrate at the time he issued the warrant can be considered in determining whether there was probable cause.[4] The court further compounded this error by relying on a statute, appropriately not considered by the trial court, which could not possibly have applied to the Petitioner. Second, the court deviated from the precedent established by this Court and other federal courts which requires that information found to be false or misleading must be redacted from the affidavit in making the probable cause determination. Both of these misapprehensions of the law represent significant departures from established precedent and the decision

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[4]Although an exception to this rule exists where information not presented to the magistrate would cast doubt on the existence of probable cause, this exception is clearly not applicable here.

should, therefore, not be allowed to stand.[5]

As previously adverted to, the affidavit in support of the Petitioner's arrest contained as the sole basis for probable cause the averment that the Petitioner "failed to report to Magistrate Court as required by a Summons that she received on 10/17/89 for Parking in A Fire Lane, thus violating SC Code of Law # 17015-90. Incident happened in the Parking Lot of the Florence County Public Service Bldg" (J.A. 116). As the majority concedes, the reference to § 17-15-90 was erroneous, and the facts in the af-

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[5]Because the appellate court found no underlying constitutional violation, it did not consider the liability of Young and the County. As the dissent notes, however, the evidence was sufficient to support the jury's verdict against both Young and the County (App. A-79).

fidavit could not be sufficient to establish probable cause for a violation of that statute.

This determination, which the majority concedes is supported in the record, should have ended the appellate court's inquiry. Instead, the court undertook a search of South Carolina law to find some other statute for which the facts of the instant case would establish probable cause that a statute had been violated.

The Fourth Circuit Court of Appeals has previously recognized that a warrantless arrest may be upheld as against a probable cause challenge even when there is no probable cause for the offense listed by the arresting officer in the initial booking entry, if the facts before the arresting officer would have given him probable cause to arrest for

some other closely related offense. See Sevigny v. Dicksey, 846 F.2d 953, 956 n.4 (4th Cir. 1988) (stating that as a general rule, "the offense actually charged by the arresting officer does not limit the basis upon which the validity of his arrest may be upheld"). As the dissent recognized, however, the rationale for this rule does not apply to arrests made pursuant to warrants, since warrants are issued by magistrates charged by law with the duty of making sure that the investigating officers are not mislabeling the alleged offense (App. A-40). Thus, the majority's attempt to substitute another offense for the offense charged in the affidavit was in error.

Even if such a substitution of offenses could be appropriate in making the probable cause determination on appeal,

it is clear that the facts in Young's affidavit are insufficient to support a reasonable belief that the Petitioner had committed any criminal offense recognized under South Carolina law at the time. In reaching the opposite conclusion, the majority relied on S.C. Code Ann. § 56-5-730 (1991), which makes it a misdemeanor to "do any act forbidden [by] or fail to perform any act required [by]" Chapter 5 of Title 56. What the majority overlooks, however, is the fact that § 56-5-20 (1991) of the South Carolina Code states that "[t]he provision [sic] of this chapter relating to the operation of vehicles refer exclusively to the operation of vehicles upon highways." In short, the sections of the Code cited and relied upon by the majority apply solely to highways, while the incident involved

in the instant case occurred in a parking lot. The cited sections are, therefore, clearly inapplicable. The majority's statement that "it appears that section 56-5-710(1) authorized the issuance of the summons ordering Wilkes to appear in magistrate court," (App. A-4-5 n.1), is clearly a misreading of the statute. Section 56-5-710(1) (1991 & Cum. Supp. 1993), rather than describing an "act forbidden" by Chapter 5, is merely an acknowledgment that municipalities retain the right to regulate parking on their streets.[6]

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[6]The majority's position that § 56-5-730 made it a misdemeanor to fail to comply with a parking summons issued by local authorities is belied by the fact that in 1992 the legislature amended Chapter 5 to add § 56-7-80(F) (Cum. Supp. 1993), which makes it a misdemeanor to fail to appear in court as directed by a summons issued by municipal law enforcement authorities to enforce a municipal ordinance. Under the majority's reading

A search of South Carolina law for some conceivable basis for the Petitioner's arrest is clearly inappropriate on appellate review of a civil case such as the case at bar, and the majority's attempt to insinuate itself in the province of the jury in this regard should be rejected. Even so, a search reveals that at the time the warrant was issued, the facts alleged in Young's affidavit simply did not support probable cause to believe that a criminal offense had been committed under South Carolina law.[7] There-

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of Chapter 5, such an amendment would have been quite unnecessary, for the failure to obey such a summons would already have been a misdemeanor under § 56-5-730.

[7]Although magistrates are given contempt powers under South Carolina law, their power to punish for contempt is limited by statute to acts of contempt committed in the magistrate's presence while the magistrate is performing the duties of his office. S.C. Code Ann. §

fore, the appellate court erred in concluding that the jury could have found that probable cause existed for the Petitioner's arrest under § 56-5-730.

Even if it were a criminal offense in South Carolina to fail to appear before a magistrate as required by a summons received for parking in a fire lane, the affidavit would clearly be insufficient to support such an offense, if one existed, once the false and misleading statements are properly redacted. On this issue, the appellate court clearly failed to apply the precedent established by this Court and the other federal courts of appeals.

In Franks v. Delaware, 438 U.S. 154 (1978), this Court held that statements

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22-3-950 (1989); 1976-77 Op. S.C. Att'y Gen. No. 77-406 (Dec. 27, 1977).

in a warrant affidavit that are shown by a preponderance of the evidence to be false or misleading, and to have been made with either knowledge of their falsity or reckless disregard for their truth, must be disregarded in deciding whether the warrant is supported by probable cause. Federal courts that have considered the issue have held that the Franks rule applies in actions under § 1983 alleging arrest without probable cause. See Olson v. Tyler, 771 F.2d 277, 281 & n.6 (7th Cir. 1985); DeLoach v. Bevers, supra, 922 F.2d at 621-23; Hindman v. City of Paris, supra, 746 F.2d at 1067-68.

As the Fifth Circuit Court of Appeals has noted, whether a particular statement in a warrant affidavit is false or misleading within the meaning of

Franks, and, if so, whether it was made with knowledge of its falsity or reckless disregard for its truth are subsidiary questions of fact for the jury. Hindman v. City of Paris, supra, 746 F.2d at 1067. As the Fifth Circuit noted in an earlier case, "where facts relied upon to show probable cause in a § 1983 action [for false arrest] are controverted, they must be resolved by the jury before controlling legal principles are applied." Garris v. Rowland, 678 F.2d 1264, 1270 (5th Cir.), cert. denied, 459 U.S. 864 (1982).

The evidence before the trial court, viewed in the light most favorable to the Petitioner, was sufficient to permit the jury to find under the Franks rule that the averments relating to the Petitioner's having "received" a "summons" to

appear in Magistrate's Court were false and misleading and were made recklessly if not with actual knowledge of their falsity. There was considerable evidence in the record that these statements, even if not literally false, were sufficiently likely to mislead the issuing magistrate to come within the Franks rule. See State v. Olson, 11 Kan. App. 2d 485, 726 P.2d 1347, 1352 (1986) (statements which, though not literally untruthful, are materially misleading may be considered "false" under Franks).

Indeed, the likely interpretation of these statements is that the Petitioner had received a standard official summons signed by a magistrate, and that she had been personally served with such a summons. This interpretation would comport with the magistrate's understanding of

the term as it is used in S.C. Code Ann. § 22-3-930 (1989) (authorizing a magistrate to issue a "summons" requiring any person to appear before him to give testimony, but requiring that such a summons be "served personally").

As previously stated, however, the Petitioner never actually received the document. As Young admitted, the only notice that Mrs. Wilkes was ever given of her alleged obligation to appear in Magistrate's Court was contained in a crude homemade parking ticket left on the windshield of her car at a time when it was being operated by someone else (J.A. 65). Although captioned a "summons," the document was so irregular as to give the Petitioner a reasonable basis to question its validity. The document was partially handwritten on a piece of plain white

paper, rather than being typed on a standard printed summons form, and it was signed by an employee of the County Buildings and Grounds Department, rather than by a judge or a police officer. In addition, while the Petitioner admitted that she knew that her daughter had found the document on her car, she also said that she herself had never seen it. And if the jury believed the testimony of the Petitioner and her witnesses, which they apparently did, the Petitioner's skepticism regarding the document's validity was confirmed by County officials (J.A. 35).

Based on these facts, which are amply supported in the record, the jury could reasonably have found Young's allegation that the Petitioner had "received" a "summons" to appear in Magis-

trate's Court to be a false or misleading statement within the meaning of Franks.

In addition, the evidence was also sufficient to support a jury finding that Young made the averment with at least reckless disregard for their truth. Young admitted that he signed the affidavit form in blank, that he gave the magistrate's secretary the authority to draft the statement it attributed to him as she saw fit, and that he permitted her to submit the completed form (including the misleading statement in question) to the magistrate as his sworn testimony, without even bothering to read what she had written (J.A. 64-66). These facts clearly provide sufficient support for a reasonable jury to find that Young acted with reckless disregard for the truth of the statements contained in the affidavit

he submitted to the magistrate. As the dissent noted, "swearing to the truth of a statement one has not even read is the very essence of reckless disregard for its truth" (App. A-53). Further evidence of Young's recklessness is found in the fact that, while Young claimed at trial that he did not know that his signing of the affidavit would lead to the Petitioner's arrest, the words "ARREST WARRANT" were prominently displayed, in bold print, directly below his signature on the affidavit form.

Having determined that the jury could have reasonably found that the statements in the affidavit that Petitioner had "received" a "summons" were false and misleading and recklessly made, the jury appropriately disregarded those statements.

In its opinion, however, the majority takes the position that, even disregarding the averment that the Petitioner "received" a "summons," the jury's verdict still cannot stand because the magistrate had before him "other uncontroverted facts set forth in the affidavit, [that] easily established probable cause that Wilkes failed to appear as required by the parking summons." The only alleged "other uncontroverted fact" to which the majority refers, however, is the "fact" that the ticket was placed on the Petitioner's car. According to the majority, this fact, together with the uncontroverted fact that the Petitioner did not appear, "indisputably supported a reasonable belief that Wilkes failed to appear as required by the parking summons" (App. A-35).

There is nothing in the record to support the majority's position on this issue, however. It is undisputed that the only information before the magistrate at the time he issued the warrant was that contained in Young's affidavit. That affidavit stated, in its entirety, that the Petitioner had

> fail[ed] to report to Magistrate Court as required by a Summons that she received on 10/17/89 for Parking in A Fire Lane, thus violating SC Code of Law # 17015-90. Incident happened in the Parking Lot of the Florence County Public Service Bldg.

(J.A. 116.)

Upon redaction of the misleading averments that the Petitioner had "received" a "summons" requiring her to report to Magistrate's Court, as required by Franks v. Delaware, supra, 438 U.S. at 156, the only remaining factual allega-

tions in the affidavit are that the Petitioner had "fail[ed] to report to Magistrate Court . . . for Parking in a Fire Lane . . . in the parking lot of the Florence County Public Service Building." These allegations, however, are indisputably insufficient to support a reasonable belief that the Petitioner had failed to appear as required by a summons she received, since they do not indicate that she ever received any sort of summons, either in person or on her car.

The majority refuses to apply the clear mandate of Franks, however, choosing instead to create a requirement of clarification, as opposed to redaction of false and misleading information. As the majority states: "Even if it is assumed that Young, by using the word received, intended deliberately to mislead the

magistrate into believing that Wilkes received the summons in person, rather than on her car, his statement still plainly conveys, even without the possible inference that she personally received the summons, the uncontroverted fact that the ticket had been placed on Wilkes' car" (App. A-10-11). This notion is directly in conflict with settled law, however. Under the precedent of this Court, once it is shown that the affidavit includes a statement that is deliberately or recklessly false or misleading, the existence of probable cause must be judged with that statement altogether removed, redacted, excised, or excluded from the affidavit, not clarified or explained to remove any potentially misleading inferences that may arise from it. See Franks v. Delaware,

supra, 438 U.S. at 156 (probable cause determination must be made "with the affidavit's false material set to one side," on the basis of its "remaining content"); Hindman v. City of Paris, supra, 746 F.2d at 1067 ("Under Franks, . . . statements in an affidavit based on intentional or reckless misrepresentations must be struck, and the warrant's validity then judged on its remaining contents"); 2 W. LaFave, supra, § 4.4(c) at 52 (Supp. 1993) ("when the Franks defect is [the] inclusion in the affidavit of recklessly or knowingly false information, that information must be deleted and the affidavit judged on the basis of the remaining information").

Once Franks is appropriately applied, the main difficulty with the panel's position in the instant case is,

of course, that without the misleading and false statements the affidavit contains no information whatsoever that "plainly conveys . . . the uncontroverted fact that the ticket had been placed on Wilkes' car" (App. A-10-11). Once redacted, it contains no mention of anything being placed on her car, be it a summons or a ticket.[8] Even if the panel's attempted "clarification"

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[8]While Young may have told the magistrate's secretary that a ticket was left on the car, there was no evidence that she relayed this statement to the issuing magistrate. Even if she had, it still could not properly be considered, since it was not made under oath. See U.S. Const. amend. IV (probable cause may be established only by information related to the magistrate "on Oath or affirmation"); Tabasko v. Barton, 472 F.2d 871, 874 (6th Cir. 1972) (affiant's oral statements to issuing magistrate could not be used to supplement his written affidavit, because they were not made under oath), cert. denied, 412 U.S. 908 (1973); Frazier v. Roberts, 441 F.2d 1224, 1227-29 (8th Cir. 1971) (same).

standard was otherwise permitted by Franks, it would nonetheless be in direct conflict with another well-established rule in this Court's fourth amendment jurisprudence. As this Court has stated, "an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate." Whiteley v. Warden, 401 U.S. 560, 565 n.8 (1971); see also Aguilar v. Texas, 378 U.S. 108, 109 n.1 (1964) ("It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention"); Spinelli v. United States, 393 U.S. 410, 413 n.3 (1969) (same). The fact that Young may have been aware of the fact that a ticket was

left on the Petitioner's car is irrelevant to the probable cause determination, for that information was not properly before the issuing magistrate. Thus, the fact that it is now undisputed, as the panel states, that a ticket labeled a "summons" had been left on the Petitioner's car, this fact cannot properly be considered in determining whether the warrant was supported by probable cause. See State v. Thompson, 178 W. Va. 254, 358 S.E.2d 815, 817 (1987) (a warrant cannot "survive challenge when it is supported only by a false statement, even though facts could have been alleged at the time that would have justified the issuance of the warrant").

Finally, it should be noted that the panel is mistaken in its belief that, as long as there is evidence of the ticket

being placed on her car, there was "ample evidence to establish a reasonable belief, if not a legal certainty, that Wilkes had notice of her obligation to appear" (App. A-12). The two cases cited by the panel in support of this position are easily distinguishable, and, in any event, do not provide support for the panel's notion that placing a ticket on a citizen's car is sufficient notice of his or her impending arrest for failure to appear in court.

In Morris v. City of New York Parking Violations Bureau, 527 F. Supp. 724, 726 (S.D.N.Y. 1981), a car had been cited for numerous parking violations. After a default judgment was entered on the unpaid tickets, the car was seized by a Marshal, and was released to the owner after he paid the amount of the judgment,

plus fees and impounding charges. There was no attempt in Morris to imprison the car owners.

Likewise, in Saukstelis v. City of Chicago, 932 F.2d 1171 (7th Cir. 1991), the challenged action was the immobilization of vehicles by use of a "boot." Such action would only be taken against "[a]n owner who accumulates 10 tickets that have been neither paid nor contested" and then only after the owner "receives a new notice, threatening the boot unless within 21 days he pays the fines, files an appearance contesting them, or applies for an administrative hearing concerning the tickets and the propriety of booting." Id. at 1173. Contrary to the panel's characterization of Saukstelis as standing for the proposition that paper on windshield equals

sufficient notice, the Seventh Circuit in Saukstelis specifically stated that "[m]ail to the registered owner of the car, at the address in the state's files --an address the owner is supposed to keep current--is reasonably calculated to produce actual knowledge. . . . Repeated notices are almost certain to do so." Id. Significantly, Judge Easterbrook specifically recognized that a far different question would be presented if, instead of seizing the car, the City attempted to seize the individual.[9] In neither of these cases was the owner of the vehicle arrested, detained, or im-

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[9]"Although in Los Angeles the loss of one's car may be the functional equivalent of imprisonment, in Chicago the owner of a booted car can rent another one or resort to taxis or public transportation. Expenses of substitutes are a far cry from loss of liberty." Id. (emphasis added).

prisoned. Furthermore, in Saukstelis the notice afforded the owner before his car was "booted" was not merely the ticket on his windshield, but also consisted of notice by mail to the registered owner. These cases are, therefore, far afield both factually and analytically from the situation presented by the case at bar.

As the foregoing discussion shows, the majority decision of the panel applies a standard markedly different from that recognized by this Court in Franks and the many other federal courts which have applied Franks in the context of a § 1983 action. This Court should therefore grant this Petition in order to prevent the erosion of the well-settled law in this area. If the Petition is denied and the panel's decision is allowed to stand, it will undoubtedly be construed to allow

a court to engage in a post hoc search of the law for any conceivable charge which might fit the facts of the case; it would also serve as precedent for the court to then use after-the-fact testimony and other evidence not before the magistrate at the time the warrant was signed to "clarify" the facts supporting the substituted charge. As the dissent notes, such a standard would "make a mockery of the probable cause requirement" (App. A-62-63). Finally, this Court need not look far to see the negative consequences of the precedent established by the panel's decision, for the case at bar itself "provides a prime example of a law-abiding citizen's being left at the mercy of low-level official caprice, callous inattention, and deliberate indifference by a judicial willingness to re-

lax the fundamental requirements, apparently out of some overriding sense that there simply is not that much at stake here" (App. A-64-65). The panel's decision, therefore, not only erodes the protections of the fourth amendment for all citizens, but also leaves this particular citizen without a remedy.

3. IN REVERSING THE JUDGMENT IN FAVOR OF THE PETITIONER ON HER "OUTRAGE" STATE TORT CAUSE OF ACTION, THE COURT OVERLOOKED MATERIAL FACTS, IMPERMISSIBLY SUBSTITUTED ITS VIEW OF THE EVIDENCE FOR THAT OF THE TRIAL COURT, AND MISAPPLIED THE COMMON LAW AND STATUTES OF SOUTH CAROLINA.

The appellate court's resolution of the Petitioner's state law claim of outrage or intentional infliction of emotional distress again demonstrates the court's enthusiasm for substituting its judgment for that of the jury. In re-

versing the judgment, the court stated that the Petitioner "has failed altogether to establish either the state of mind, the conduct or the suffering necessary to recover for the tort of outrage" (App. A-16). This ruling is clearly contrary to the facts in the record, taken in the light most favorable to the Petitioner, and is also contrary to controlling South Carolina law.

As previously discussed in connection with the Petitioner's claims under § 1983, that the conduct was "intentional or reckless," which is the requisite state of mind to support a claim of outrage, was supported by ample evidence presented to, and obviously credited by, the jury. The evidence showed that Young had signed the affidavit in blank, permitted a secretary to complete it as she

saw fit, and authorized her to submit the affidavit to the magistrate as his sworn testimony, without bothering to read what she had written (J.A. 65, 87-88). As the dissent stated, swearing to the truth of a statement one has not even read is the very essence of recklessness (App. A-53). Furthermore, Young signed the affidavit with the words "ARREST WARRANT" prominently displayed near his signature, a fact which would clearly permit the jury to infer that Young intended the Petitioner to be arrested on the strength of the information which would be contained in the affidavit (J.A. 116).

The appellate court's minimizing of the appellant's suffering and characterization of her four-hour detention as "an unpleasant experience" is belied by the record facts. The Petitioner, a law

abiding citizen and grandmother, was fingerprinted, photographed, and confined in the jail's "holding tank" for four hours, during which time she cried uncontrollably, was nervous, embarrassed, and suffered from chest pains (J.A. 36-38). Also during this period of confinement, the Petitioner suffered humiliation from the taunts of fellow inmates and significant physical harm resulting from the exacerbation of preexisting diabetic and coronary conditions. She further had to suffer the humiliation of depending on her employer of 12 years to have to obtain her release by posting bond (J.A. 36-38).

Whether these facts establish the state of mind, the conduct, and the suffering sufficient to establish the tort of outrage was a determination for the

jury who heard the testimony of the witnesses and weighed the evidence. It was therefore error for the appellate court to substitute its view of the evidence for that of the jury.[10]

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[10]In addition, the appellate court failed to appreciate the impact of S.C. Code Ann. § 15-78-30(b), (f) (Supp. 1990), by erroneously stating that this provision would preclude recovery for any loss resulting from intentional infliction of emotional harm. Subsection (b) of this provision in the South Carolina Tort Claims Act defines "claim" as a written demand against the State of South Carolina or a political subdivision caused by the tort of an employee of the state or subdivision while acting within the scope of his official duty. Subsection (f) defines "loss" so that the political subdivision's liability for damages includes all the elements of actual damages, "but does not include the intentional infliction of emotional harm." Even assuming that the political subdivision is not liable for the "outrage" cause of action, these code sections do not provide immunity for the individual defendant Young. Section 15-78-70(B) states that nothing under the Tort Claims Act gives an employee of a political subdivision immunity if his conduct "constituted actual fraud, actual malice, intent to harm or a crime involving moral

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant this petition and issue a writ of certiorari to the Fourth Circuit Court of Appeals.

Respectfully submitted,

R. Bryan Harwell
Harwell, Ballenger & DeBerry
Post Office Box 107
Florence, South Carolina 29503
803-662-6301

Attorney for Petitioner

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turpitude."

APPENDIX

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Gloria Turner WILKES,
Plaintiff-Appellee,

v.

Legrand YOUNG, individually and as agent and in his official capacity of the County of Florence; The County of Florence, South Carolina,
Defendants-Appellants.

No. 92-2177.

United States Court of Appeals,
Fourth Circuit.

Argued June 8, 1993.

Decided July 12, 1994.

ARGUED: William Reynolds Williams, Willcox, McLeod, Buyck, Baker & Williams, Florence, SC, for appellants. Robert Bryan Harwell, Harwell, Ballenger & DeBerry, Florence, SC, for appellee.

Before PHILLIPS, LUTTIG, and WILLIAMS, Circuit Judges.

Reversed by published opinion. Judge LUTTIG wrote the majority opinion, in which Judge WILLIAMS joined. Judge PHILLIPS wrote a dissenting opinion.

OPINION

LUTTIG, Circuit Judge:

Gloria Wilkes sued the County of Florence, South Carolina and its Director of Buildings and Grounds, LeGrand Young, in federal district court, alleging a cause of action under 42 U.S.C. § 1983 and seven supplemental causes under South Carolina tort law, all arising from her arrest for failing to appear in court as required by a parking summons. A jury returned a verdict for Wilkes on her section 1983 claim and one of her state law claims, awarding damages in the sum of $40,000.00 against Young and Florence County, and further awarding punitive damages of $7,500.00 against Young alone. Young and Florence County now appeal the judgment against them. Finding no violation of Wilkes' federal rights, and also finding that Wilkes failed to establish the elements of the tort of intentional

infliction of emotional distress, we reverse the judgment below.

I.

On October 17, 1989, Gloria Wilkes' daughter parked Wilkes' car illegally in the parking lot of the Florence County Public Services Building. The car was ticketed with a summons requiring the owner of the car--Wilkes--to appear in magistrate court at 10:00 a.m. on November 10, 1989. When Wilkes' daughter told her about the ticket, Wilkes simply instructed her daughter to "check into it," J.A. at 34, and apparently never herself read the ticket. Neither Wilkes nor her daughter appeared in magistrate court on the specified date.

LeGrand Young reported to magistrate court on November 10, 1989, to testify regarding the ticket issued to Wilkes. In response to Wilkes' failure to appear in court, the magistrate instructed Young

to complete the necessary paperwork. Young approached the magistrate's secretary and told her that Wilkes had not appeared in court and that he had been told to fill out the necessary papers. The secretary told Young that she did not have time to type out an affidavit but, if he signed the form, she would fill it out with the simple information that he had just provided her. The affidavit signed by Young and completed by the secretary reads in relevant part that, on November 10, 1989, Wilkes

> fail[ed] to report to Magistrate Court as required by a Summons that she received on [October 17, 1989] for Parking in A Fire Lane, thus violating [South Carolina] Code [§] 17-15-90.[1] Incident happened in the

[1]The citation to S.C.Code § 17-15-90, which addresses failure to appear following arrest and release on personal recognizance, is obviously a clerical error. The intended citations presumably

[p]arking [l]ot of the Florence County Public Service B[uilding]. J.A. at 116. On the strength of this affidavit, a warrant for Wilkes' arrest was issued. A deputy sheriff subsequently met Wilkes at her place of employment around lunchtime, and explained that he had come because of her failure to appear as required by the ticket. Wilkes admitted knowing that her daughter had received the ticket, and agreed to drive down to the magistrate's office to resolve the matter. The magistrate was not

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were to S.C.Code §§ 56-5-710(1) (giving local authorities the power to regulate parking of vehicles) and 56-5-730 (making it a misdemeanor not to perform any act required in chapter 5 of title 56). Because it appears that section 56-5-710(1) authorized the issuance of the summons ordering Wilkes to appear in magistrate court, it would clearly have been a misdemeanor under section 56-5-730 for Wilkes to have failed to appear, contrary to the suggestion in the dissent, post at 1371-72. Cf. 1989 S.C. Op. Atty. Gen No. 89-88, p. 237 (misdemeanor violation of § 56-5-730 to refuse to obey order issued pursuant to authority in chapter 5).

present, however, and Wilkes was detained for three to four hours, at which point bond was posted and Wilkes was released. Wilkes' bond was ultimately returned to her and the failure to appear charge dismissed.

Wilkes subsequently brought this action against Young and the County of Florence in federal district court, contending that both were liable to her under 42 U.S.C. § 1983. Wilkes also alleged seven supplemental state tort claims, of which all but three were dismissed by the court. After a trial, the jury rendered a verdict for Wilkes on her section 1983 cause of action and on her state law cause of action for intentional infliction of emotional distress. The jury awarded Wilkes damages in the sum of $40,000.00 against both Young and Florence County, and additionally imposed punitive damages in the amount of

$7,500.00 against Young alone. The district court denied the defendants' motions for Judgment Notwithstanding a Verdict and a new trial, and entered judgment for Wilkes in accordance with the jury's verdict. Young and Florence County appeal the judgment against them.

II.

A.

[1, 2] Appellants first argue that the jury's verdict imposing section 1983 liability cannot stand because Wilkes failed to prove any violation of her constitutional rights. We agree.

Wilkes contends, as she did below, that Young violated her Fourth Amendment rights by submitting a false affidavit to secure a warrant for her arrest.[2]

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[2]Wilkes also set forth a substantive due process claim in her complaint, although she has wisely elected not to press this claim on appeal. As the Supreme Court has recently ruled, an individual alleging that he was prosecuted in the absence of probable cause states no

Evidently assuming that Young's sworn statement that Wilkes "received" the ticket could only mean that she actually took physical possession of it, Wilkes argues that for Young to have made this statement when in fact he did not know whether Wilkes had personally received the ticket constituted "blatant misconduct" that violated her Fourth Amendment rights. We are not persuaded.

[3] As an initial matter, we doubt that any reasonable juror could find that Young lied by stating that Wilkes "received" the parking ticket, since, as a matter of common sense, the statement that Wilkes "received" a ticket in fact means nothing more or less than that the ticket was placed on the windshield of

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substantive due process claim. Albright v. Oliver, ___ U.S. ___, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). Such a claim, the Court held, can only be judged under the Fourth Amendment. Id. ___ _ ___, 114 S.Ct. at 810-12.

her car, a fact which no one disputes. See, e.g., United States v. Ventresca, 380 U.S. 102, 108-09, 85 S.Ct. 741, 745-46, 13 L.Ed.2d 684 (1965) (warrant affidavits to be construed in "commonsense and realistic" way, not "grudgingly" or "hypertechnically"). More importantly, even conceding that reasonable jurors could read Young's statement as stating that Wilkes herself physically received the ticket, and therefore could find that the statement was a misrepresentation (since Young did not at the time know, as we do now, that Wilkes actually had notice of the ticket), Young still committed no Fourth Amendment violation. It is well-established that a false or misleading statement in a warrant affidavit does not constitute a Fourth Amendment violation unless the statement is "necessary to the finding of probable cause." Franks v. Delaware, 438 U.S. 154, 156, 98

S.Ct. 2674, 2676, 57 L.Ed.2d 667 (1978); see, e.g., United States v. George, 971 F.2d 1113, 1123 at n. 15 (4th Cir.1992). Here, probable cause for Wilkes' arrest plainly existed even in the absence of Young's purported misrepresentation; thus, even accepting Young's statement as a lie, it could not possibly have constituted a Fourth Amendment violation because the material falsely represented was altogether unnecessary to the magistrate's finding of probable cause.

The affidavit before the magistrate presented him with the facts that Wilkes' car had been parked illegally, that Wilkes had "received" a summons for this parking violation, that the summons directed her to appear in court and that Wilkes failed to appear in court as required. Even if it is assumed that Young, by using the word "received," intended deliberately to mislead the magis-

trate into believing that Wilkes received the summons in person, rather than on her car, his statement plainly conveys, even without the possible inference that she personally received the summons, the uncontroverted fact that the ticket had been placed on Wilkes' car. See Franks, 438 U.S. at 156, 98 S.Ct. at 2676 (false material must be "set to one side"). This information, together with the other uncontroverted facts set forth in the affidavit, easily established probable cause that Wilkes failed to appear as required by the parking summons.

[4] Probable cause only requires enough evidence "'to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Brinegar v. United States, 338 U.S. 160, 175-76, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949) (quoting Carroll v. United States, 267 U.S. 132, 162, 45 S.Ct. 280,

288, 69 L.Ed. 543 (1925) (footnote omitted)). That the ticket requiring Wilkes to appear in court was placed on her car obviously provides more than ample evidence to establish a reasonable belief, if not a legal certainty, that Wilkes had notice of her obligation to appear. Cf. Saukstelis v. City of Chicago, 932 F.2d 1171, 1173 (7th Cir.1991) ("parking ticket is itself a notice"); Morris v. City of New York Parking Violations Bureau, 527 F.Supp. 724, 726 (S.D.N.Y.1981) (parking summons placed on car but alleged never to have been received provides prior notice of car seizure for unpaid summonses). This information, combined with the uncontroverted fact that Wilkes did not appear, indisputably supported a reasonable belief that Wilkes failed to appear as required by the park-

ing summons.[3] Because probable cause for Wilkes' arrest obviously existed even in the absence of Young's purported misrepresentation that Wilkes herself physically received the ticket, Young's statement was "[un]necessary to the finding of probable cause," Franks, 438 U.S. at 156, 98 S.Ct. at 2676, and, therefore, al-

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[3]In fact, the only information even potentially relevant to the failure to appear offense not known to Young when he signed the affidavit was whether Wilkes ever had actual notice of her duty to appear. (Of course, we now know that Wilkes actually did know about the ticket and could only have been unaware of her obligation to appear in court by negligently failing to read it.) However, whether or not proof that Wilkes knew of the ticket would be necessary to convict her of the failure to appear offense, it is beyond question that such proof is not necessary to establish probable cause to arrest her for not appearing in court in response to the express requirement of the summons. See, e.g., Bennett v. City of Grand Prairie, Texas, 883 F.2d 400, 405 (5th Cir.1989) (probable cause "requires 'much less evidence' than is required to convict") (citation omitted); see also Brinegar, 338 U.S. at 173, 69 S.Ct. at 1309 (large difference in "quanta and modes of proof" between establishing guilt and probable cause).

together immaterial for Fourth Amendment purposes. Because Wilkes proved no violation of her constitutional rights, she cannot possibly prevail on her section 1983 claim, and we accordingly reverse the imposition below of section 1983 liability.

B.

[5] We are equally unpersuaded that South Carolina law permitted the jury's verdict for Wilkes on her state law cause of action for intentional infliction of emotional distress.

[6] The Supreme Court of South Carolina has clearly specified that, in order to recover for the tort of intentional infliction of emotional distress (also known as the tort of outrage), a plaintiff must prove that--

> (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or sub-

stantially certain that such distress would result from his conduct;

(2) the conduct was so "extreme and outrageous" as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;"

(3) the actions of the defendant caused the plaintiff's emotional distress; and

(4) the emotional distress suffered by the plaintiff was "severe" so that "no reasonable man could be expected to endure it."

Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776, 778 (1981) (quoting Vicnire v. Ford Motor Credit Co., 401 A.2d 148 (Me.1979) (quoting Restatement (Second) of Torts § 46, Comment i, d, j)). We have no doubt that Wilkes' brief detention caused her some distress. However, even assuming

that the jury could have found under Ford's third prong that Young's conduct caused this distress, Wilkes has failed altogether to establish either the state of mind, the conduct or the suffering necessary to recover for the tort of outrage.

First, Wilkes presented no evidence that Young intentionally or recklessly inflicted any harm. Allowing that the jury might have found that Young was, by signing the blank affidavit, reckless as to the affidavit's accuracy, there is no evidence whatsoever that he either knew or should have known that signing the affidavit would inflict severe emotional distress. Second, for Young, a maintenance man, to have reported to the magistrate's secretary, as instructed by the magistrate himself, that Wilkes failed to appear as required by the

ticket she had received, and then, at the secretary's behest, to have signed a blank affidavit, simply does not rise to the level of conduct required under South Carolina law to establish the tort of outrage. However one characterizes Young's rather innocuous conduct, it is simply beyond the realm of reasonableness to suggest that it "was so 'extreme and outrageous' as to exceed 'all possible bounds of decency'" or that it was "'atrocious, and utterly intolerable in a civilized community.'" Ford, supra, 276 S.E.2d at 778 (citations omitted). Finally, Wilkes failed to adduce evidence that she suffered emotional distress severe enough to satisfy the elements of the tort of outrage. Although, like any arrest, Wilkes' rather routine three-to-four hour detention at the Florence County Sheriff's Office was surely an unpleasant experience, the suffering it

caused to Wilkes cannot plausibly be described as so severe that "'no reasonable man could be expected to endure it.'" Id.

[7] Quite plainly, Wilkes failed to set forth facts which jurors could reasonably regard as establishing the elements of the tort of outrage. Under South Carolina law, therefore, Wilkes' outrage claim should properly have been withheld from the jury, Todd v. South Carolina Farm Bureau Mutual Insur. Co., 283 S.C. 155, 321 S.E.2d 602, 609 (Ct.App.1984), quashed on other grounds, 287 S.C. 190, 336 S.E.2d 472 (1985) (it is for court to determine in the first instance whether defendant's acts were so outrageous as to establish liability for infliction of severe distress), and we

accordingly reverse the judgment for Wilkes on that count.[4]

III.

For the above-stated reasons, we reverse the district court's judgment imposing section 1983 and state tort liability on both Young and the County of Florence.

REVERSED.

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[4]We note as well that the South Carolina Tort Claims Act would appear to preclude recovery for any loss resulting from intentional infliction of emotional harm. S.C.Code § 15-78-30(b), (f) (Supp.1990).

PHILLIPS, Circuit Judge, dissenting:

At the core of the Fourth Amendment is the probable cause requirement that protects us all from "rash and unreasonable interferences with privacy and . . . unfounded charges of crime." Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949). 42 U.S.C. § 1983 provides a private federal right of action with civil remedies to vindicate the right secured. In this action brought under that statute, a federal jury, properly instructed on the nature of the probable cause requirement, found on sufficient evidence that a fellow citizen, Gloria Wilkes, had been arrested without probable cause and had sustained significant emotional and physical injury as a result of the incarceration that followed. It further found, again on a proper instruction as to controlling law and on sufficient evidence,

that a governmental official, LeGrand Young, and the County that employed him had effectively caused the unconstitutional arrest: the official by recklessly misrepresenting facts upon which the warrant for her arrest was issued, and the County, by condoning the known practice among its employees, including Young, of which this episode was an example bound sooner or later to happen.

The panel majority in this case has now vacated the judgment entered on that jury verdict. Obviously viewing the whole of this citizen's unhappy encounter with the law as a relatively routine and consensual one with no significant harm done in any event,[1] the majority

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[1]Epitomizing this basically dismissive view of the whole matter, the majority says that Mrs. Wilkes "agreed to drive down to the magistrate's office to resolve the matter", ante, at 1364, and then characterizes her stay in jail as a "rather routine three-to-four hour detention at the . . . Sheriff's Office", id. at 1366. A fair reading of the record

concludes that the arrest was not in fact unconstitutional--that it was based on probable cause and, though "false," was so only because of a "rather innocuous" mistake in judgment. Ante, at 1366. It therefore does not address the further questions of specific culpability of Young and the County for causing the false arrest.

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belies any such characterizations of these events. Once presented with a warrant for her arrest, Mrs. Wilkes of course complied with the deputy sheriff's demand that she go with him to the magistrate's office, as any law-abiding citizen would have done. But she certainly did not do so with the understanding that she would be booked and thrown into jail once she got there; to the contrary, she testified that the deputy sheriff had assured her that she could take care of everything simply by going down to the magistrate's office with him and paying the fine for the parking ticket. See JA36, 44. Nor would most of us, at least those who have some acquaintance with the realities of incarceration in local jail facilities, be likely to characterize her stay there as a "rather routine" one for a law-abiding citizen such as Mrs. Wilkes.

I believe the majority could only reach this conclusion either by impermissibly re-examining the facts found by the jury or by misapprehending the law of probable cause as applied in this context, or both, and that in fact it has done both. I therefore dissent from the judgment which on this basis vacates Mrs. Wilkes' award of money damages and leaves her without remedy. I would instead affirm the judgment, which requires that I also discuss the basis upon which the liability of Young and the County were properly established by the jury verdict.[2]

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[2]Mrs. Wilkes' action also included a pendent state law claim for the tort of outrage, which the jury also decided in her favor. Because the damages awarded on that claim were not cumulative of those awarded on the § 1983 claims, hence do not affect the size of the judgment on those claims, I do not address the defendants' challenges to that portion of the judgment.

I.

I begin by briefly recapitulating the facts, either as undisputed or as necessarily found by the jury on evidence that was clearly sufficient, under the standard by which we properly may review its sufficiency. Doing so reveals a classic example of just the sort of recklessness and deliberate indifference by lower-level governmental officials and governmental bodies that, probably much more frequently than deliberate intent and malice and the like, has been the instrument of governmental violations of Fourth Amendment rights--most frequently those of citizens least able by position and place in society to avoid or protect themselves against it.

On November 13, 1989, in Florence, South Carolina, Gloria Wilkes, a grandmother, registered nurse, and law-abiding citizen who had never before been ar-

rested, was arrested without warning at the nursing home where she had worked for more than 12 years, and taken to the local jail, where she was fingerprinted and photographed and then confined in the jail's "holding tank" for four hours, during which she suffered humiliation from the taunts of fellow inmates and significant physical harm resulting from the exacerbation of preexisting diabetic and coronary conditions, before her employer managed to obtain her release by posting bond.

The arrest was made under a warrant specifically charging Mrs. Wilkes with the state criminal offense, under S.C.Code Ann. § 17-15-90 (Law. Co-op.1985 & Supp.1993), of willful failure to appear in Magistrate's Court following arrest and release on personal recognizance, obviously conduct not chargeable to her since she had not been earlier

arrested and released on recognizance. The sole basis for the issuance of that legally erroneous warrant was an affidavit signed by an employee of the Florence County Building and Grounds Department, LeGrand Young, which stated that Mrs. Wilkes had "fail[ed] to report to Magistrate Court as required by a Summons that she received . . . for Parking in A Fire Lane"--an affidavit that Young had signed in blank, permitted a secretary to complete as she saw fit, and authorized her to submit to the magistrate as his sworn testimony, without bothering to read what she had written. Not surprisingly, the affidavit, as completed by the secretary, contained several statements that were materially false or misleading, most critically the statement that Mrs. Wilkes had in fact been properly served with an

official summons to appear in court.[3] Several months later, another state magistrate, apparently the one assigned to try the charges against Mrs. Wilkes, determined in the course of an informal

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[3]The undisputed evidence at trial established that the only notice that Mrs. Wilkes was ever given of her alleged obligation to appear in Magistrate's Court was contained in a crude homemade parking ticket left on the windshield of her car when her daughter parked it in front of the Florence County Social Services Building while she was attempting to obtain disaster relief following Hurricane Hugo. Though this document was captioned "summons" and directed the owner of the car to appear in Magistrate's Court at a certain time, it did not look like an official summons: it was handwritten on a piece of plain white paper, rather than being typed on a standard printed summons form, and it was signed by an employee of the County Building and Grounds Department, rather than by a judge or a police officer. Mrs. Wilkes admitted that she knew that her daughter told her she had found this piece of paper on her car. But she also testified that she herself had never seen it, and that her daughter told her that she had been assured--by both a deputy sheriff and someone in the magistrate's office--that it could not be a legitimate summons, because of its irregular form and manner of service, and that they should therefore disregard it.

pre-trial investigation of the charges, that the information contained in Young's affidavit had been materially false and misleading and that there was in fact no probable cause to prosecute Mrs. Wilkes for the offense charged in the warrant on which she was arrested (or, for that matter, any other criminal offense). He therefore ordered the charges against Mrs. Wilkes dropped.

Mrs. Wilkes then filed this action under 42 U.S.C. § 1983 against Young and his employer, the County of Florence, alleging that they had caused her to be arrested without probable cause, in violation of her Fourth Amendment rights. The case was tried to a jury of the parties' peers, who found, under proper instructions as to which no challenge is made on this appeal, that Mrs. Wilkes had in fact been arrested without probable cause, and that Young and the County

were liable for this wrong under § 1983.

II.

To recover on her § 1983 claim against Young in his individual capacity, and Florence County as his employer, Mrs. Wilkes had to prove, first, that she had been "deprived of [the] right[ ] . . . secured by the Constitution" not to be arrested but upon probable cause; second, that one or both of the defendants, acting under color of state law, had "subject[ed], or cause[d] [her] to be subjected," to that deprivation of right. 42 U.S.C. § 1983. The jury necessarily found that she had proved both, against both defendants. The majority now concludes that, as a matter of law, the evidence was insufficient to support the jury's probable cause finding.

I believe the majority is wrong--both in its legal analysis and in its

assessment of the evidence--in so concluding. In the first place it has either basically misapprehended or misapplied the standard by which we are reviewing the jury's no-probable-cause determination. We are not reviewing it as we would a trial judge's determination of probable cause in a suppression hearing, in which criminal setting it is an issue for the judge. We are reviewing it as a finding made by a jury in a civil action to recover money damages. In that setting, the Seventh Amendment requires that, if the evidence be legally sufficient, the probable cause issue is one for the jury. See McKenzie v. Lamb, 738 F.2d 1005, 1007-08 (9th Cir.1984) (Kennedy, J.); Deary v. Three Un-Named Police Officers, 746 F.2d 185, 190-92 (3d Cir.1984); Patzig v. O'Neil, 577 F.2d

841, 848 (3d Cir.1978).[4] And where, as here, a properly-instructed jury has found that the plaintiff was in fact arrested without probable cause, we may not, under the normal review standard, set aside that finding for evidentiary insufficiency so long as the evidence adduced at trial, viewed in the light most favorable to the plaintiff and drawing all reasonable inferences in her favor, would permit a reasonable jury to reach the same conclusion. See Lester v.

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[4]Accord Reeves v. City of Jackson, 608 F.2d 644, 650 (5th Cir.1979); Lester v. City of Chicago, 830 F.2d 706, 714-15 (7th Cir.1987); Giordano v. Lee, 434 F.2d 1227, 1230 (8th Cir.1970), cert. denied, 403 U.S. 931, 91 S.Ct. 2250, 29 L.Ed.2d 709 (1971); Stringer v. Dilger, 313 F.2d 536, 541 (10th Cir.1963); DeLoach v. Bevers, 922 F.2d 618, 623 (10th Cir.1990), cert. denied, ___ U.S. ___, 112 S.Ct. 65, 116 L.Ed.2d 41 (1991); see also Llaguno v. Mingey, 763 F.2d 1560, 1565 (7th Cir. 1985) (en banc) (Posner, J.) (applying same rule for existence of probable cause to search); B.C.R. Transport Co. v. Fontaine, 727 F.2d 7, 10 (1st Cir.1984) (same).

City of Chicago, 830 F.2d 706, 714-15 (7th Cir.1987) (applying this standard in affirming jury verdict for § 1983 plaintiff on claim of arrest without probable cause); DeLoach v. Bevers, 922 F.2d 618, 623 (10th Cir.1990) (same), cert. denied, ___ U.S. ___, 112 S.Ct. 65, 116 L.Ed.2d 41 (1991); see also Stringer v. Dilger, 313 F.2d 536, 541 (10th Cir.1963) (applying same standard in reversing JNOV for defendant on § 1983 claim based on arrest without probable cause); Patzig, 577 F.2d at 848 (applying same standard in reversing directed verdict for defendants on § 1983 claim based on arrest without probable cause).

In this case, the jury found, after hearing Young's testimony and being properly instructed as to the legal meaning of probable cause,[5] that Mrs. Wilkes had

[5]After instructing the jury that to succeed on her Fourth Amendment claim, Mrs. Wilkes would have to show that her

in fact been arrested without probable cause. Under the proper review standard, the majority's conclusion that the evidence was legally insufficient to permit the jury to make that finding is simply untenable. As the trial judge instructed the jury, and the majority concedes, ante, at 1365, probable cause to arrest exists only when the facts and circumstances known at the time are sufficient

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arrest was "not based upon probable cause," the trial judge explained that:

> Probable cause exists where the facts and circumstances within a person's knowledge, including any reasonably trustworthy information, are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been committed.

Record, vol. 3, at 107. This definition of probable cause is virtually identical to the one that the majority purports to be applying in making its own apparently de novo inquiry into the issue of probable cause. See ante, at 1365 & n. 3 (probable cause "requires enough evidence to warrant a man of reasonable caution in the belief that an offense has been or is being committed") (internal quotations omitted).

to warrant a person of reasonable prudence in the belief that the suspect has committed or is committing a criminal offense. Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 225-26, 13 L.Ed.2d 142 (1964); Brinegar, 338 U.S. at 175-76, 69 S.Ct. at 1310-11. While the quantum of evidence required to establish probable cause is of course less than that required to establish guilt beyond a reasonable doubt, id. at 173, 69 S.Ct. at 1309, a "mere suspicion" that the suspect has engaged in some unspecified criminal activity is not sufficient to support a full-blown custodial arrest. Id. at 176-77, 69 S.Ct. at 1311-12. And where, as here, it is not clear that a crime has been committed at all, something more--approaching a "more probable than not" showing--is required to establish probable cause than is the case when a crime has obviously been committed and the only

uncertainty is about who committed it. See, e.g., State v. Drott, 412 So.2d 984, 986 (La.1982); People v. Carrasquillo, 54 N.Y.2d 248, 445 N.Y.S.2d 97, 99-100, 429 N.E.2d 775, 778 (1981); State v. Frazier, 421 A.2d 546, 550 (R.I.1980); State v. Johnson, 363 So.2d 684, 689 (La.1978). See generally 1 W. LaFave, Search and Seizure § 3.2(e), at 594-96 (2d ed.1987).

In deciding the probable cause issue here, the jury was entitled to consider only the information that was before the magistrate at the time he issued the warrant under which that arrest was made. See id. § 3.2(d), at 575-76.[6] The undisputed evidence at trial established that the only information before the magistrate when he issued the warrant for

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[6]There is no claim here that the arrest itself was valid, even if the warrant was not, because the arresting officers themselves had sufficient information, independent of the warrant, to give them probable cause to make a warrantless arrest.

Mrs. Wilkes' arrest was the affidavit of LeGrand Young. The only specific factual averments made in that affidavit were that Mrs. Wilkes had "fail[ed] to report to Magistrate Court as required by a Summons that she received on 10/17/89 for Parking in A Fire Lane . . . in the Parking Lot of the Florence County Public Service Bldg." JA116. Though the majority says that this information "plainly," "easily," "obviously," and "indisputably" established probable cause to arrest Mrs. Wilkes, ante, at 1365-66, it does not identify, because it could not, the precise criminal offense or offenses for which it thinks probable cause to arrest existed. It could not do so because the facts provided in Young's affidavit--even if accepted as true, which the jury obviously did not--do not establish reasonable grounds to believe that Mrs.

Wilkes committed any criminal offense recognized under South Carolina law at the time of her arrest.

As Mrs. Wilkes argued below, and the jury properly found, the facts given in Young's affidavit could not support a reasonable belief that Mrs. Wilkes had committed the offense specifically charged to her in the arrest warrant: a violation of S.C.Code § 17-15-90. That provision makes it a criminal offense to "wilfully fail[ ] to appear" in court as required following arrest and release on personal recognizance. S.C.Code Ann. § 17-15-90 (Law. Co-op.1985 & Supp.1993). Young's affidavit contained no facts to suggest that Mrs. Wilkes' alleged failure to appear occurred after she had been arrested and released on personal recognizance. It was therefore insufficient, as a matter of law, to establish probable

cause to arrest Mrs. Wilkes for a violation of S.C.Code § 17-15-90.

Obviously aware of this difficulty, the majority does not suggest that there was probable cause to arrest for the offense charged in the warrant itself. Instead, it says that the warrant's reference to § 17-15-90 was a "clerical error," and that the intended offense must have been a violation of S.C.Code § 56-5-730. Ante, at 1364 n. 1. This must assume--though the assumption is never stated explicitly--that an arrest made under a warrant that charges an offense for which probable cause does not exist is not unlawful so long as a post hoc search of the relevant criminal statutes can turn up some other offense for which the issuing official might properly have issued a warrant on the facts before him. The majority cites no authority to support this proposition; I believe there is

none. We have previously recognized that a warrantless arrest may be upheld as against a probable cause challenge even when there is no probable cause for the offense listed by the arresting officer in the initial booking entry, if the facts before the arresting officer would have given him probable cause to arrest for some other closely-related offense. See Sevigny v. Dicksey, 846 F.2d 953, 956 n. 4 (4th Cir.1988) (as a "general rule," "the offense actually charged by the arresting officer does not limit the basis upon which the validity of his arrest may be upheld"). Accord Blanding v. State, 446 So.2d 1135, 1136 (Fla.App.1984) ("An arrest based on probable cause is not rendered unlawful because the arresting officer attaches an improper label to it"). See generally 2 LaFave, supra, § 5.1(e). The rationale for this rule is obvious: even when conduct is clearly

criminal, its "precise legal characterization" often involves "legal subtleties with which an arresting officer should not be required to concern himself." See Model Code of Pre-Arraignment Procedure § 120.1(2), at 297 (1975). But that rationale does not apply to arrests made pursuant to warrants that charge the wrong offense, since warrants are issued by magistrates who are charged by law with the duty of making sure that the investigating officers are not ascribing the wrong legal label to particular conduct. See United States v. Evans, 574 F.2d 352, 355 n.** (6th Cir.1978) ("the question is not what the judge could do, but what, in legal effect, he did do") (emphasis in original); 2 LaFave, supra, § 4.3(a), at 168 ("the Fourth Amendment . . . requires more than that a valid warrant could have been issued") (emphasis in original).

Even assuming that an arrest made under a warrant charging an offense for which there is no probable cause could be upheld if there were probable cause to believe the arrestee committed some other criminal offense, the jury's finding of no probable cause here could not be set aside on that basis, for the facts given in Young's affidavit are insufficient, as a matter of law, to support a reasonable belief that Mrs. Wilkes had committed any criminal offense that was recognized by South Carolina law at the time of her arrest. There obviously was no probable cause to think that she had committed the offense suggested as a possibility by the majority, a violation of S.C.Code § 56-5-730. That provision makes it a misdemeanor to "do any act forbidden [by] or to fail to perform any act required [by]" Chapter 5 of Title 56. S.C.Code Ann. § 56-5-730 (Law. Co-op.1991). Nothing in

Chapter 5 of Title 56, which regulates traffic on the state's highways, requires the owner of a car to report to Magistrate's Court when directed to do so by a summons issued for parking in a fire lane on municipal property. So § 56-5-730 cannot be the offense for which the majority purports to find probable cause as a matter of law.[7]

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[7] The majority suggests that because § 56-5-710(1) "appears" to have "authorized the issuance of the summons ordering Wilkes to appear in magistrate court," her failure to do so "would clearly have been a misdemeanor under section 56-5-730." Ante, at 1364 n. 1. This argument cannot be squared with the language of the statutes involved.

As the majority concedes, § 56-5-730 makes it a misdemeanor only to "do any act forbidden [in] or to fail to perform any act required in this chapter [Chapter 5 of Title 56]." S.C.Code Ann. § 56-5-730 (Law. Co-op.1977) (emphasis added). Though § 56-5-710(1) appears in Chapter 5 of Title 56, it does not of its own force "forbid" or "require" anyone to perform any act in the sense referred to in § 56-5-730; instead, it simply allocates regulatory power between the local authorities and the state, reserving to the former the power to regulate the parking of vehicles on streets and high-

ways under their jurisdiction, to the extent they can do so without undermining the provisions of Chapter 5 that regulate traffic on the state's highways. See S.C.Code Ann. § 56-5-710 ("Subject to the limitations proscribed in § 56-5-930, the provisions of this chapter shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from . . . (1) Regulating the standing or parking of vehicles"). There is no authority for the majority's suggestion that § 56-5-730 was intended to criminalize the failure to obey any order issued by local authorities under the general power to regulate parking reserved to them by this savings provision. The South Carolina Attorney General opinion relied on by the majority does not support this proposition, for it involved the failure to perform an act that was specifically required by the terms of a provision of Chapter 5 itself: § 56-5-740, which provides that "[n]o person shall willfully fail or refuse to comply with any lawful order or direction of any police officer, fireman or uniformed adult school crossing guard invested by law with authority to direct, control or regulate traffic." And if § 56-5-730 made it a misdemeanor to fail to comply with a parking summons issued by local authorities under the power reserved to them by the § 56-5-710 savings provision, as the majority suggests, the legislature would have had no reason to amend Chapter 5 in 1992 to add § 56-7-80(F), which makes it a misdemeanor to fail to appear in court as directed by a summons issued by municipal law enforcement authorities

Perhaps the majority means to say that the facts given in Young's affidavit were sufficient, as a matter of law, to support a reasonable belief that Mrs. Wilkes had committed the "offense" of criminal contempt of court. See Bloom v. Illinois, 391 U.S. 194, 201, 88 S.Ct. 1477, 1481, 20 L.Ed.2d 522 (1968) ("Criminal contempt is a crime in the ordinary sense"). If so, it is wrong again, for the failure to comply with a summons to appear in Magistrate's Court can never constitute criminal contempt under South Carolina law. In that state, a magistrate has no authority to hold an absent defendant in criminal contempt for failure to appear, because his power to punish for contempt is limited by statute to acts of contempt committed in his pres-

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to enforce a municipal ordinance, for the failure to obey such a summons would already be a misdemeanor under § 56-5-730. See infra n. 9.

ence while he is performing the duties of his office. See S.C.Code Ann. § 22-3-950 (Law. Co-op.1989); 1976-77 S.C. Op. Att'y. Gen. No. 77-406 (Dec. 27, 1977).[8]

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[8]When a defendant fails to comply with a summons to appear before a magistrate, the normal procedure in South Carolina, as elsewhere, is for the magistrate to direct the clerk to issue a bench warrant under which the defendant is physically brought before him to answer the noticed charge, not to have him arrested for the separate "crime" of contempt. 1976-77 S.C. Op. Att'y. Gen. No. 77-406 (Dec. 27, 1977); see S.C.Code Ann. § 22-3-930 (Law. Co-op.1989) (when person fails to comply with a summons to appear issued by a magistrate, magistrate "may issue a rule commanding such witness to be brought before him"); id. § 14-17-260 (Law. Co-op.1977) (authorizing clerk to issue bench warrant when directed to do so by court). This is presumably what the magistrate before whom Mrs. Wilkes had been scheduled to appear had in mind when he told Young to go down to his office and "do what is necessary," JA65, after she failed to show up in court: the issuance of a bench warrant commanding her to be brought before him to answer for the alleged parking violation. But the warrant under which Mrs. Wilkes was arrested was not a bench warrant issued to compel her appearance on the underlying parking offense; it was a warrant for her arrest on a separate criminal charge of failure to appear. Had Young bothered to read the form he signed after it was completed by the

In short, at the time this warrant was issued, it was simply not a criminal offense under South Carolina law to do what Young's affidavit stated that Mrs. Wilkes had done: fail to appear before a magistrate as directed by a summons received for parking in a fire lane.[9] Thus, even if the jury had accepted everything in Young's affidavit as

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magistrate's secretary, rather than signing it in blank and leaving her to fill it out as she saw fit, he might have discovered this problem.

[9]After Mrs. Wilkes filed this lawsuit, the South Carolina Code was amended to make it a misdemeanor to fail to appear in court as directed by an "ordinance summons"--a uniform summons form adopted by a municipality, in accordance with certain statutory requirements, for use in the enforcement of its ordinances --with which one has been properly served. 1992 S.C. Acts No. 328, § 1 (codified at S.C.Code Ann. § 56-7-80(F)) (Law. Co-op.1993 Supp.) (effective April 10, 1992). The affidavit in question here was issued in November of 1989, more than two years before this provision went into effect.

true--which, as explained more fully below, there is considerable reason to think it did not--it could not reasonably have come to any conclusion other than the one it did: that Mrs. Wilkes was arrested without probable cause.

Finally, even if it had been a criminal offense in South Carolina to fail to appear before a magistrate as required by a summons received for parking in a fire lane, the jury verdict here could not properly be set aside on that account. For even if on that basis Young's affidavit had been facially sufficient to establish probable cause with respect to such an offense, that would not end the inquiry. Statements in a warrant affidavit that are shown by a preponderance of the evidence to be false or misleading, and to have been made with either knowledge of their falsity or reckless disregard for their truth, must be dis-

regarded in deciding whether the warrant is supported by probable cause. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978) (criminal suppression hearing); see Olson v. Tyler, 771 F.2d 277, 281 & n. 6 (7th Cir.1985) (applying Franks rule in § 1983 action for arrest without probable cause); DeLoach v. Bevers, 922 F.2d 618, 621-23 (10th Cir.1990) (same), cert. denied, ___ U.S. ___, 112 S.Ct. 65, 116 L.Ed.2d 41 (1991); Hindman v. City of Paris, 746 F.2d 1063, 1067-68 (5th Cir.1984) (same).[10] In a § 1983 damages action for unconstitutional

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[10]The Supreme Court's decision in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), which created the good-faith exception to the exclusionary rule, expressly left the Franks rule intact. Id. at 923, 104 S.Ct. at 3420-21 (good-faith exception does not apply, and suppression remains an appropriate remedy, when "the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth").

arrest, whether a particular statement in a warrant affidavit is false or misleading within the meaning of Franks, and, if so, whether it was made with knowledge of its falsity or reckless disregard for its truth, are themselves subsidiary questions of fact for the jury. Id. at 1067.

The evidence in this record, viewed in the light most favorable to Mrs. Wilkes, was sufficient to permit the jury to find under the Franks rule that it must exclude from the probable cause inquiry the affidavit's allegation that Mrs. Wilkes had "received" a "summons" to appear in Magistrate's Court. There was considerable evidence that this statement, even if not literally false, was sufficiently likely to mislead the issuing magistrate to qualify as a "false or misleading statement" for purposes of Franks. See State v. Olson, 11 Kan.App.2d 485, 726 P.2d 1347, 1352

(1986) (statements which, though not literally untruthful, are materially misleading may be considered "false" under Franks). The magistrate was very likely to interpret Young's statement as meaning that Mrs. Wilkes had received a standard official summons signed by a magistrate, and that she had been personally served with such a summons. See S.C.Code Ann. § 22-3-930 (Law. Co-op.1989) (authorizing a magistrate to issue a "summons" requiring any person to appear before him to give testimony, but requiring that such a summons be "served personally"). The undisputed evidence established that neither of these things had actually happened. First, as Young himself admitted, the only notice that Mrs. Wilkes was ever given of her alleged obligation to appear in Magistrate's Court was contained in a crude homemade parking ticket left on the windshield of

her car at a time when it was being operated by someone else. Though this document was captioned "summons" and directed the owner of the car to appear in Magistrate's Court at a certain time, it did not look like an official summons: it was handwritten on a piece of plain white paper, rather than being typed on a standard printed summons form, and it was signed by an employee of the County Building and Grounds Department, rather than by a judge or a police officer. Similarly, there was no evidence whatsoever that this so-called "summons" had ever been personally served upon Mrs. Wilkes. While Mrs. Wilkes admitted that she knew that her daughter had found it on her car, she also said that she herself had never seen it, and that her daughter said she had been assured--by both a deputy sheriff and someone in the magistrate's office--that it could not

be a legitimate summons, because of its irregular form and manner of service. On this record, the jury could reasonably have found Young's allegation that Mrs. Wilkes had "received" a "summons" to appear in Magistrate's Court to be a false or misleading statement within the meaning of Franks. This is so because it gave the false impression not only that she had received a standard summons to appear issued by a magistrate, but also that she had been personally served with such a summons.

The evidence was also sufficient to permit the jury to find the other prerequisite for exclusion of Young's misstatement under Franks: that Young made it with at least reckless disregard for its truth. Young admitted that he signed the affidavit form in blank, that he gave the magistrate's secretary the authority to draft the statement it attributed to

him as she saw fit, and that he permitted her to submit the completed form (including the misleading statement in question) to the magistrate as his sworn testimony, without even bothering to read what she had written. On this record, the jury could reasonably have found that Young acted with reckless disregard for the truth of the statements contained in the affidavit he submitted to the magistrate: swearing to the truth of a statement one has not even read is the very essence of reckless disregard for its truth.

The majority asserts that even if we disregard Young's allegation that Mrs. Wilkes had "received" a "summons," the jury's verdict still cannot stand, because the issuing magistrate had before him "other uncontroverted facts" that "easily established probable cause" to believe that she had failed to appear as required by a summons she received for

parking in a fire lane. Ante, at 1365. This is plainly wrong. It is undisputed that the only information before the magistrate at the time he issued the warrant was that contained in Young's affidavit. That affidavit stated, in its entirety, that Mrs. Wilkes had

> fail[ed] to report to Magistrate Court as required by a Summons that she received on 10/17/89 for Parking in A Fire Lane, thus violating SC Code of Law # 17015-90. Incident happened in the Parking Lot of the Florence County Public Service Bldg.

JA116. When the affidavit is redacted to remove the misleading assertion that Mrs. Wilkes had "received" a "summons" requiring her to report to Magistrate's Court, as Franks requires, see 438 U.S. at 156, 98 S.Ct. at 2676-77, its remaining factual allegations--that she had "fail[ed] to report to Magistrate Court . . . for

Parking in a Fire Lane . . . in the parking lot of the Florence County Public Service Building"--are flatly insufficient to support a reasonable belief that Mrs. Wilkes had failed to appear as required by a summons she received, since they do not indicate that she ever received any sort of summons, either in person or on her car.

The majority's contrary conclusion apparently rests on the notion that Franks does not require false or misleading statements in a warrant affidavit to be altogether excluded from the probable cause inquiry, so long as they are "clarified" to correct their misleading effect. See ante, at 1365 ("Even if it is assumed that Young, by using the word received, intended deliberately to mislead the magistrate into believing that Wilkes received the summons in person, rather than on her car, his statement

still plainly conveys, even without the possible inference that she personally received the summons, the uncontroverted fact that the ticket had been placed on Wilkes' car") (emphasis added). This, again, is plainly wrong. It is settled law that once a warrant affidavit is shown to include a statement that is deliberately or recklessly false or misleading, the existence of probable cause must be judged with that statement altogether removed, redacted, excised, or excluded from the affidavit, not clarified or explained to remove any potentially misleading inferences that may arise from it. See Franks, 438 U.S. at 156, 98 S.Ct. at 2676 (probable cause determination must be made "with the affidavit's false material set to one side," on the basis of its "remaining content"); Hindman, 746 F.2d at 1067 ("Under Franks, . . . statements in an

affidavit based on intentional or reckless misrepresentations must be struck, and the warrant's validity then judged on its remaining contents") (emphasis added); 2 LaFave, supra, § 4.4(c), at 52 (Supp.1993) ("when the Franks defect is [the] inclusion in the affidavit of recklessly or knowingly false information, that information must be deleted and the affidavit judged on the basis of the remaining information") (emphasis added). The statement that must be redacted here is the statement that Mrs. Wilkes had "received" a "summons" requiring her to report to Magistrate's Court, which, as indicated, was misleading in at least two respects. If that statement is redacted from the affidavit, it contains no information whatsoever that "plainly conveys . . . the uncontroverted fact that the ticket had been placed on Wilkes' car," ante, at 1365, since it contains no men-

tion of anything being placed on her car, be it a summons or a ticket.

Finally, even if Franks did permit the sort of "clarification" the majority has in mind, it could not be accomplished here without running afoul of another basic tenet of Fourth Amendment jurisprudence: the rule that "an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate." Whiteley v. Warden, 401 U.S. 560, 565 n. 8, 91 S.Ct. 1031, 1035 n. 8, 28 L.Ed.2d 306 (1971); see Aguilar v. Texas, 378 U.S. 108, 109 n. 1, 84 S.Ct. 1509, 1511 n. 1, 12 L.Ed.2d 723 (1964) ("It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention") (emphasis in original); Spinelli v. Uni-

ted States, 393 U.S. 410, 413 n. 3, 89 S.Ct. 584, 587 n. 3, 21 L.Ed.2d 637 (1969) (same). The majority wants to "clarify" Young's misrepresentation with evidence that a parking ticket captioned "summons" had in fact been placed on the windshield of a car registered in Mrs. Wilkes' name, a fact which it characterizes as "uncontroverted." Ante, at 1365. Young may well have had reason to believe, at the time he signed the blank affidavit, that such a ticket had been left on Mrs. Wilkes' car. But that information was not properly before the issuing magistrate. The only information Young himself communicated to the issuing magistrate was contained in his written affidavit. That affidavit said nothing whatsoever about a "summons," "ticket," or anything else being left on Mrs. Wilkes' car. Young may have said something to this effect to the magistrate's

secretary, but there was no evidence that she relayed this statement to the issuing magistrate; and even if she had, it still could not properly be considered, since it was not made under oath. See U.S. Constit. amend. IV (probable cause may be established only by information related to the magistrate "on Oath or affirmation"); Tabasko v. Barton, 472 F.2d 871, 874 (6th Cir.1972) (affiant's oral statements to issuing magistrate could not be used to supplement his written affidavit, because they were not made under oath), cert. denied, 412 U.S. 908, 93 S.Ct. 2288, 36 L.Ed.2d 974 (1973); Frazier v. Roberts, 441 F.2d 1224, 1227-29 (8th Cir.1971) (same). Under these circumstances, the fact that a ticket labelled a "summons" had been left on Mrs. Wilkes' car--even if known to Young himself, and since admitted by Mrs. Wilkes--cannot properly be considered in determining

whether the warrant was supported by probable cause. See State v. Thompson, 178 W.Va. 254, 358 S.E.2d 815, 817 (1987) (there is no authority "for the proposition that a warrant can survive challenge when it is supported only by a false statement, even though facts could have been alleged at the time that would have justified the issuance of the warrant").

At bottom, the majority's decision seems to rest on little more than the notion that in an after-the-fact probable cause challenge to an arrest made pursuant to a warrant, all doubts must be resolved in favor of the arrest's validity, because of the strong preference for the use of warrants. See United States v. Ventresca, 380 U.S. 102, 106, 85 S.Ct. 741, 744, 13 L.Ed.2d 684 (1965) ("in a doubtful or marginal case a search [or arrest] under a warrant may be sustainable where without one it would fail").

But this general rule of deference to a magistrate's finding of probable cause has no proper application where, as here, it has been established that the magistrate's very finding was distorted by deliberate or reckless misstatements contained in the warrant application. See 2 LaFave, supra, § 4.4(c), at 199. "[W]hen it has been established that the [magistrate's] earlier finding of probable cause was based upon a broader set of 'facts,' some of which are now shown to be false, there is no longer any reason to give deference to that earlier finding," and a court revisiting the probable cause issue with the false or misleading allegations excised from the affidavit should resolve "doubtful or marginal" cases in the defendant's favor, as it would if the action in question had been taken without a warrant. Id. A contrary rule would make a mockery of the

probable cause requirement, by encouraging police officers to "sanitize" doubtful arrests with warrants obtained on the basis of affidavits that contain deliberate falsehoods designed to mislead a magistrate into finding probable cause where there is none. See Franks, 438 U.S. at 168, 98 S.Ct. at 2682-83.

In the end, the basic difference between the majority's approach to this probable cause issue and mine probably turns on the importance we attach to the need for rigid adherence to the "technicalities" of the requirement. I believe we should hold firm on them--for good reason. Looked at from the law enforcement side, the good faith rule of Leon in criminal prosecutions and good faith immunity doctrine in civil matters give all the protection that is needed against the suppression of evidence and the chilling of police initiative, practical con-

sequences otherwise flowing from found violations that have been deemed intolerable for policy reasons. With those protections in place, no relaxation of the substantive requirement itself is warranted to give further protection to the criminal justice system and to individual law enforcement officers. And, more critically, looked at from the arrestee's side: "The history of the use, and not infrequent abuse, of the power to arrest cautions that a relaxation of the fundamental requirements of probable cause would 'leave law-abiding citizens at the mercy of the officers' whim or caprice.'" Wong Sun v. United States, 371 U.S. 471, 479, 83 S.Ct. 407, 413, 9 L.Ed.2d 441 (1963) (quoting Brinegar, 338 U.S. at 176, 69 S.Ct. at 1311).

This case provides a prime example of a law-abiding citizen's being left at

the mercy of low-level official caprice, callous inattention, and deliberate indifference by a judicial willingness to relax the fundamental requirements, apparently out of some overriding sense that there simply is not that much at stake here--either for this plaintiff or for the Fourth Amendment.

III.

Because I would hold that the jury's finding that Mrs. Wilkes was arrested without probable cause was firmly supported, I must go on to consider, as the majority does not, whether the evidence was also sufficient to support the jury's further findings that Young and the County were liable for that constitutional violation under § 1983.

A.

I take first the question of Young's personal liability. Mrs. Wilkes' § 1983

claim against Young is somewhat unusual, because of where he stands in the chain of events leading up to the constitutional violation of which she complains. The normal target of a § 1983 action for an arrest without probable cause is the officer who actually made the arrest. See, e.g., Sevigny v. Dicksey, 846 F.2d 953 (4th Cir.1988) (warrantless arrest). But Young did not arrest Mrs. Young himself; he swore out the affidavit upon which the warrant for her arrest was issued, a warrant which was then issued and executed by others. Can he still be held liable under § 1983 for the injuries she suffered when she was arrested without probable cause? The answer, on current doctrine, clearly is that he may be.

Section 1983 creates a civil damages remedy against "[e]very person who, under color of [state law] . . ., subjects, or causes to be subjected, any citizen . . .

to the deprivation of . . . rights . . . secured by the Constitution." 42 U.S.C. § 1983. While the Supreme Court held early on that the "subjects, or causes to be subjected" language does not permit the imposition of vicarious liability, Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 691-95, 98 S.Ct. 2018, 2036-38, 56 L.Ed.2d 611 (1978), it has also made clear that it does permit the imposition of liability upon actors more remote than those who actually inflict the ultimate constitutional injury, when their own conduct can be said to have played a significant role in "causing" that injury. Id. at 692, 98 S.Ct. at 2036-37 (municipality may be held liable under § 1983 for constitutional violations committed by its employees, when those violations are shown to have been "caused" by some official policy or

custom of the municipality); City of Canton v. Harris, 489 U.S. 378, 385-86, 109 S.Ct. 1197, 1202-03, 103 L.Ed.2d 412 (1988) (same); see also Slakan v. Porter, 737 F.2d 368, 372-73 (4th Cir.1984) (holding that supervisory officials may be held liable under § 1983 for constitutional violations committed by their subordinates on a similar analysis), cert. denied, 470 U.S. 1035, 105 S.Ct. 1413, 84 L.Ed.2d 796 (1985). But in order to prevent this remote actor liability from sliding into vicarious liability, courts have insisted on a showing that the remote actor himself was somehow at fault and that this fault was a proximate cause of the ultimate constitutional violation suffered by the plaintiff. See, e.g., Canton, 489 U.S. at 388-91, 109 S.Ct. at 1204-06 ("fault" and "causation" are essential prerequi-

sites for municipal liability); Spell v. McDaniel, 824 F.2d 1380, 1385-91 (4th Cir.1987) (same), cert. denied, 484 U.S. 1027, 108 S.Ct. 752, 98 L.Ed.2d 765 (1988); Slakan, 737 F.2d at 372-76 (same re supervisory liability).

Applying these general principles, a number of courts have recognized that § 1983 liability may be imposed in the situation at hand in this case upon an official who submits a false or misleading affidavit to a magistrate, on the basis of which a warrant is issued that results in an arrest without probable cause. See DeLoach v. Bevers, 922 F.2d 618, 621-23 (10th Cir.1990), cert. denied, ___ U.S. ___, 112 S.Ct. 65, 116 L.Ed.2d 41 (1991); Olson v. Tyler, 771 F.2d 277, 280-82 (7th Cir.1985); Pennington v. Hobson, 719 F.Supp. 760, 767

(S.D.Ind.1989).[11] Though these cases have not always couched their analysis explicitly in the language of "fault" and "causation," the evidentiary showing they have required to impose liability upon the false affiant plainly suffices to establish both of those elements: (i) that the defendant submitted a warrant affidavit containing statements he knew to be false or misleading, or would have known to be so had he not recklessly disregarded the truth (the "fault" component), and (ii) that the magistrate would not have

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[11]Several courts have gone even further and held that an officer who induces a magistrate to issue a warrant not supported by probable cause by submitting a completely truthful affidavit may be held liable under § 1983 for a resulting Fourth Amendment violation, if he should have known, at the time he applied for the warrant, that the affidavit did not establish probable cause. See Briggs v. Malley, 748 F.2d 715 (1st Cir.1984), aff'd sub nom. Malley v. Briggs, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986); Garmon v. Lumpkin County, 878 F.2d 1406 (11th Cir.1989) (same).

had probable cause to issue the warrant without those false statements or misleading statements (the "causation" component). See Olson, 771 F.2d at 281 (in such circumstances, "not only is [the affiant's] conduct the active cause of the illegal arrest, but he cannot be said to have acted in an objectively reasonable manner"); DeLoach, 922 F.2d at 621-22 (same).

As Mrs. Wilkes argued below, and the jury found, the evidence developed at trial was sufficient to hold Young liable under § 1983 on such a theory. As explained earlier, the evidence was sufficient to permit the jury to find that the statement in Young's affidavit that Mrs. Wilkes had "received" a "summons" to appear in Magistrate's Court was materially false or misleading. The evidence was also sufficient to permit the jury to find that Young made this false or mis-

leading statement with at least reckless disregard for its truth, if not actual knowledge of its falsity; indeed, the majority concedes as much in its discussion of the state-law outrage claim. Ante, at 1366 ("the jury might have found that Young was, by signing the blank affidavit, reckless as to the affidavit's accuracy"). Finally, the evidence was sufficient to permit the jury to find that Young's deliberate or reckless misrepresentations were a proximate cause of the wrongful arrest, since it was undisputed that the sole basis for the magistrate's issuance of the arrest warrant was Young's misleading statement that Mrs. Wilkes had failed to appear in court after receiving an official summons to do so. I would therefore affirm the damage

award entered against Young on the § 1983 claim.[12]

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[12]Young cannot escape liability here on the basis of qualified immunity. Qualified immunity is an affirmative defense, Harlow v. Fitzgerald, 457 U.S. 800, 815, 102 S.Ct. 2727, 2736-37, 73 L.Ed.2d 396 (1982); Gomez v. Toledo, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980), which can be waived for appeal purposes if not properly raised and preserved in the trial court. Buenrostro v. Collazo, 973 F.2d 39, 44 (1st Cir.1992); Walsh v. Mellas, 837 F.2d 789, 799-800 (7th Cir.), cert. denied, 486 U.S. 1061, 108 S.Ct. 2832, 100 L.Ed.2d 933 (1988); Kennedy v. City of Cleveland, 797 F.2d 297, 300 (6th Cir.1986), cert. denied, 479 U.S. 1103, 107 S.Ct. 1334, 94 L.Ed.2d 185 (1987). Though Young pleaded the defense of qualified immunity in his answer, he did not assert it as a basis for dismissal prior to trial, ask that it be submitted to the jury, urge it as a ground for overturning the verdict in his post-verdict JNOV motion, or otherwise press it in the trial court, nor has he attempted to raise it in any fashion in this court. Under these circumstances, he has waived any right that he might otherwise have had to challenge the judgment against him on that ground. See Walsh, 837 F.2d at 799-800 (defendant in § 1983 action, who raised defense of qualified immunity in answer but failed to bring it to the trial court's attention, despite having had numerous opportunities to do so, waived right to assert the defense on appeal). Accordingly, I would not reach the question whether a defense of qualified immunity might be

B.

Though the question is a good deal closer, I would also find the evidence sufficient to support the jury's verdict against the County under § 1983. Mrs. Wilkes' theory against the County was that the constitutional violation she suffered here--an arrest without probable cause--was the proximate result of a customary practice that Young and his subordinates had fallen into with respect to the prosecution of parking violations,

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available on these facts. But see DeLoach, 922 F.2d at 621-22 (affiant who makes deliberate or reckless misrepresentations in order to obtain an arrest warrant is not entitled to qualified immunity, because his conduct is per se objectively unreasonable); Olson, 771 F.2d at 281-82 (same); cf. Malley v. Briggs, 475 U.S. at 345, 106 S.Ct. at 1098 (when police officer applies for arrest warrant on the basis of an affidavit that a reasonable officer in his position would have known failed to establish probable cause, his application for the warrant is not objectively reasonable for purposes of qualified immunity analysis, because it "create[s] the unnecessary danger of an unlawful arrest").

and failures to appear in connection with them, a custom whose continued existence was fairly attributable to the County, because it had been condoned by its policymaking officials. We have previously recognized the validity of such a "condoned custom" theory of municipal liability. See Spell v. McDaniel, 824 F.2d 1380, 1390-91 (4th Cir.1987), cert. denied, 484 U.S. 1027, 108 S.Ct. 752, 98 L.Ed.2d 765 (1988). Though the issue is undoubtedly a close one, I think the evidence adduced at trial, viewed in the light most favorable to Mrs. Wilkes and giving her the benefit of all reasonable inferences therefrom, was sufficient to permit a reasonable jury to find the County liable under such a "condoned custom" theory.

Young's own uncontradicted testimony showed that he and his subordinates in the County's Buildings and Grounds De-

partment had a long-standing practice of issuing crude homemade "summonses" to appear in Magistrate's Court to the owners of cars found parked illegally on County property, JA58-59, and of serving these so-called" summonses" solely by leaving them on the windshields of the cars, JA60, 87-88. Barry Elliott, who as County Administrator was Young's immediate superior and had final authority to set County policy with respect to the enforcement of municipal parking rules and regulations, admitted that he had actual knowledge that Young and his subordinates were issuing these so-called "summonses" and serving them simply by leaving them on the windshields of cars registered in the owner's name. JA73. Young testified that when the owner of a car on which one of these so-called "summonses" had been left failed to report to Magistrate's Court as directed, it was his practice to

go to the Magistrate's office and sign an affidavit stating that they had failed to appear in Magistrate's Court as required by an official summons. JA65-67.[13] Young testified that the County Administrator, Barry Elliott had given him authority to sign these affidavits, JA60, and that Elliott was aware that he was doing so, JA 88, but did nothing to put a stop to this until after Mrs. Wilkes filed this lawsuit. JA67. Though Elliott's testimony was somewhat ambiguous, the jury could reasonably have interpreted it as confirming this. JA72-73. Fi-

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[13]Though Young testified that he did not know these affidavits might result in the issuance of arrest warrants, JA66, the jury was entitled to discount this self-serving testimony as manifestly incredible, in light of the evidence that on the standard form used by all magistrates in South Carolina, including those in Florence County, to issue arrest warrants, the space for the affiant's statement appears on the same page as the warrant itself, and the caption "ARREST WARRANT" appears in bold print immediately beneath the line for the affiant's signature. See JA116.

nally, the County's Chief Magistrate testified that the magistrates in Florence County had been issuing warrants for the arrest of individuals who failed to appear in response to these irregular-looking "summonses," based on the affidavits submitted by Young and his cohorts. JA79-82.

On this record, the jury could reasonably have found that Young and his subordinates had a customary practice of signing false or misleading affidavits for the arrest of individuals who failed to appear in Magistrate's Court as directed by homemade "summonses" placed on cars registered in their names; that the continued existence of this custom was fairly attributable to the County, because its policymaking officials had knowledge of its existence but failed, as a matter of specific intent or deliberate indifference, to put a stop to it; and

that this custom was a proximate cause of the specific constitutional violation that occurred here, an arrest without probable cause, because it made such a violation almost bound to happen, sooner or later. Because these findings are in turn sufficient to support municipal liability under a "condoned custom" theory, see Spell, 824 F.2d at 1390-91, I would reject the County's challenge to the sufficiency of the evidence to support the jury's verdict against it on the § 1983 claim.

IV.

To conclude, I disagree with the majority's basic conclusion that the evidence was legally insufficient to support the jury's finding of a Fourth Amendment violation here. Because I also think the evidence was sufficient to support the jury's findings that Young and the County are liable for that Fourth Amendment vio-

lation under § 1983, and that the verdicts rendered on the § 1983 claim are in and of themselves sufficient to support all of the damages awarded against Young and the County, I would affirm the judgments entered against them in their entirety, without reaching the question whether the evidence was sufficient to permit the jury to find for Mrs. Wilkes on her state-law outrage claim.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

GLORIA TURNER WILKES,

Plaintiff,

vs

LEGRAND YOUNG, INDIVIDUALLY AND AS AGENT AND IN HIS OFFICIAL CAPACITY FOR THE COUNTY OF FLORENCE AND THE COUNTY OF FLORENCE,

Defendants.

C/A No. 4:91-3220-21
VERDICT

FILED
JUL 21 1992
ANN A. BIRCH,
CLERK
Florence, S.C.

1. WE, THE JURY, UNANIMOUSLY FIND FOR THE PLAINTIFF ACTUAL DAMAGES IN THE SUM OF *forty thousand dollars* ($ *40,000 00/XX*) DOLLARS, AGAINST *named above defendants* THIS *21* DAY OF JULY, 1992 BECAUSE THE PLAINTIFF HAS PROVEN THE CAUSES OF ACTION WHICH ARE MARKED:

LEGRAND YOUNG	FLORENCE COUNTY	
(X)	(X)	VIOLATION OF CONSTITUTIONAL RIGHT
( )	( )	MALICIOUS PROSECUTION

( )	( )	SLANDER
(X)	(X)	INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Mattie Lou Boyd
FOREPERSON

2. WE, THE JURY, UNANIMOUSLY FIND FOR THE PLAINTIFF PUNITIVE DAMAGES AGAINST LEGRAND YOUNG IN THE SUM OF *seven thousand five hundred dollars* ($7500 00/XX

Mattie Lou Boyd
FOREPERSON

FILED: September 19, 1994

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 92-2177
(CA-91-3220-4-21)

GLORIA TURNER WILKES,

Plaintiff - Appellee,

versus

LEGRAND YOUNG, individually and as agent and in his official capacity for the County of Florence; THE COUNTY OF FLORENCE, SOUTH CAROLINA,

Defendants - Appellants.

O R D E R

Appellee has filed a petition for rehearing with suggestion for rehearing in banc. Appellants have filed an answer to the petition.

Judge Luttig voted to deny the petition for rehearing. Judge Phillips voted to grant the petition for rehearing. Judge Williams did not vote on the petition, having recused herself from further participation in this case.

A member of the Court requested a poll on suggestion for rehearing in banc. Judges Ervin, Hall, Murnaghan, Hamilton, Michael and Motz voted to rehear the case in banc and Judges Russell, Widener, Wilkinson, Wilkins, Niemeyer and Luttig voted against rehearing in banc.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Luttig for the Court.

For the Court

/s/ Bert M. Montague
Clerk

Supreme Court, U.S.
FILED
JAN 18 1995
OFFICE OF THE CLERK

No. 94-1081

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

GLORIA TURNER WILKES,

Petitioner,

v.

LEGRAND YOUNG, INDIVIDUALLY AND AS AGENT AND IN HIS OFFICIAL CAPACITY OF THE COUNTY OF FLORENCE; THE COUNTY OF FLORENCE, SOUTH CAROLINA,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION

Wm. Reynolds Williams
Willcox, McLeod, Buyck & Williams
Post Office Box 1909
Florence, South Carolina 29503
(803) 662-3258

Attorney for Respondents

QUESTIONS PRESENTED

1. Does the decision of the Fourth Circuit Court of Appeals present a special or important reason for granting certiorari in the instant case?

2. Did the Fourth Circuit Court of Appeals correctly apprehend and apply the law of probable cause?

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STATUTORY PROVISIONS INVOLVED
South Carolina Code of Laws

§56-5-540. Official traffic-control devices.

All signs, signals, markings and devices, not inconsistent with this chapter, placed or erected by authority of a public body or official having jurisdiction for the purpose of regulating, warning, or guiding traffic are "*official traffic-control devices.*"

§56-5-2530. Stopping, standing or parking prohibited in specified places; exceptions.

(A) Except when necessary to avoid conflict with other traffic, or in compliance with law or the directions of a police officer or official traffic-control device, no person shall:

(1) Stop, stand or park a vehicle:

(a) On the roadway side of any vehicle stopped or parked at the edge or curb of a street.
(b) On a sidewalk.
(c) Within an intersection.
(d) On a crosswalk.
(e) Between a safety zone and the adjacent curb or within thirty feet of points on the curb immediately opposite the ends of a safety zone, unless a different length is indicated by signs or markings.

(f) Alongside or opposite any street excavation or obstruction when stopping, standing or parking would obstruct traffic.

(g) Upon any bridge or other elevated structure upon a highway or within a highway tunnel.

(h) On any railroad tracks.

(i) On any controlled-access highway.

(j) In the area between roadways of a divided highway, including crossovers.

(k) At any place where official traffic-control devices prohibit stopping.

(2) Stand or park a vehicle, whether occupied or not, except momentarily to pick up or discharge passengers:

(a) In front of a public or private driveway.

(b) Within fifteen feet of a fire hydrant.

(c) Within twenty feet of a crosswalk at an intersection.

(d) Within thirty feet upon the approach to any flashing signal, stop sign, yield sign or traffic-control signal located at the side of a roadway.

(e) Within twenty feet of the driveway entrance to any fire station and on the side of a street opposite to any fire station with seventy-five feet of the entrance when properly signposted.

(f) At any place where official traffic-control devices prohibit standing.

(3) Park a vehicle, whether occupied or not, except temporarily for the purpose of and while actually engaged in loading or unloading property or passengers:

(a) Within fifty feet of the nearest rail or a railroad crossing.

(b) At any place where official traffic-control devices prohibit parking.

(B) No person shall move a vehicle not lawfully under his control into any such prohibited area or away from a curb such a distance as is unlawful.

§56-5-6190. General penalty for violations of chapter.

It is a misdemeanor for any person to violate any of the provisions of this chapter unless such violation is by this chapter or other law of this State declared to be a felony.

Every person convicted of a misdemeanor for a violation of any of the provisions of this chapter for which another penalty is not provided shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than thirty days.

§56-7-80. County or municipal uniform ordinance summons.

(A) Counties and municipalities are authorized to adopt by ordinance and use an ordinance summons as provided herein for the enforcement of county and municipal ordinances. Upon adoption of the ordinance summons, any county or municipal law enforcement officer or code enforcement officer is authorized to use an ordinance summons. Any county or municipality adopting the

ordinance summons is responsible for the printing, distributing, monitoring, and auditing of the ordinance summons to be used by that entity.

(B) The uniform ordinance summons may not be used to perform a custodial arrest. No county or municipal ordinance which regulates the use of motor vehicles on the public roads of this State may be enforced using an ordinance summons.

(C) An ordinance summons must cite only one violation per summons and must contain at least the following information:

(1) the name and address of the person or entity charged;
(2) the name and title of the issuing officer;
(3) the time, date, and location of the hearing;
(4) a description of the ordinance the person or entity is charged with violating;
(5) the procedure to post bond; and
(6) any other notice or warning otherwise required by law.

The ordinance summonses must be consecutively and discretely numbered. The ordinance summonses must be audited as part of the annual independent audit required in Section 4-9-150 for counties and in Section 5-7-240 for municipalities, and a separate copy of each audit must be furnished to the chief administrative officer of the county or municipality, as appropriate.

(D) Service of a uniform ordinance summons vests all magistrates' and municipal courts with jurisdiction to hear and dispose of the charge for which the ordinance summons was issued and served.

(E) Any law enforcement officer or code enforcement officer who serves an ordinance summons must allow the person served to proceed without first having to post bond or to appear before a magistrate or municipal judge. Acceptance of an ordinance summons constitutes a person's recognizance to comply with the terms of the summons.

(F) Any person who fails to appear before the court as required by an ordinance summons, without first having posted such bond as may be required or without having been granted a continuance by the court, is guilty of a misdemeanor and, upon conviction, must be fined not more than two hundred dollars or imprisoned for not more than thirty days. Any law enforcement agency processing an arrest made pursuant to this subsection must furnish such information to the State Law Enforcement Division as required by Chapter 3 of Title 23.

(G) This statute does not prohibit a county or municipality from enforcing ordinances by means otherwise authorized by law.

HISTORY: 1992 Act No. 328, §1, eff April 10, 1992.

STATEMENT OF THE CASE

On October 17, 1989 Gloria Wilkes's daughter illegally parked on Florence County property. LeGrand Young, Superintendent of those grounds, caused a parking ticket to be placed on Mrs. Wilkes's vehicle, which called for her to appear in court on November 10, 1989. (Jt. App. 115). Upon being told about the parking ticket, Mrs. Wilkes instructed her daughter to "take care of it," but Mrs. Wilkes never actually looked at the ticket. (Jt. App. 28, 30, 34, 43-44).

The daughter did not "take care" of the ticket and Mrs. Wilkes did not appear on November 10, 1989. (Jt. App. 65). LeGrand Young did sign an affidavit *in blank*, acting under instructions of the secretary to the local magistrate, when he appeared for the purpose of prosecuting the traffic ticket. (Jt. App. 68, 81, 85, 89). Thereafter, the magistrate's secretary did complete the affidavit, but in doing so incorrectly cited the statute violated by Mrs. Wilkes as South Carolina Code §17-15-90. (Jt. App. 116). As a result of the mis-citation to the South Carolina statutes, Mrs. Wilkes was arrested and spent three or four hours in jail. (Jt. App. 40).

On October 23, 1991 the Petitioner sued LeGrand Young and the County of Florence for violating her civil rights and for six common law causes of action. The Respondent answered on November 13, 1991. Trial by jury was held on July 21, 1992, during the course of which all but three of the common law causes of action were dismissed by the Court: malicious prosecution, slander, and intentional infliction of emotional distress. (Jt. App. 96).

The jury returned a verdict for the Petitioner on the §1983 claim and on the intentional infliction of emotional distress (outrage) claim. The jury returned a verdict for the Respondents on the malicious prosecution and slander causes of action; the verdict was for $40,000 actual damages, jointly, and for $7,500 punitive damages, LeGrand Young only. (Jt. App. 20-21). The Respondents filed post-trial Motions for Judgment Notwithstanding the Verdict or for a new trial, all of which were denied by Order entered August 24, 1992.

The Respondents timely appealed the judgment against them, whereupon a panel of the United States Court of Appeals for the Fourth Circuit reversed the judgment. *Wilkes v. Young*, 28 F.2d 1362 (4th Cir. 1994). On September 19, 1994 Wilkes's Petition for Rehearing was denied by the panel and by the Fourth Circuit, *en banc*, from which denial this Petition for a Writ of Certiorari timely followed.

REASONS FOR DENYING THE WRIT

The Court Should Not Exercise Its Discretion to Review the Petition Filed by Gloria Turner Wilkes

A review on Writ of Certiorari is not a matter of right, but of judicial discretion. The Petitioner has demonstrated no special or important reasons for granting certiorari in this case. Sup. Ct. R. 10. Specifically, the decision of the United States Court of Appeals for the Fourth Circuit does not conflict either with the decision of another United States Court of Appeals, *Waterman S.S. Corp. v. United States*, 381 U.S. 252 (1965), or with the decisions of this court. *Pure Oil Co. v. Suarez*, 384 U.S. 202 (1966). Neither does the decision below decide an important question of federal law which has not been, but should be, settled by this court. *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231 (1959). Moreover, the decision of the lower court does not depart from, or sanction a departure from, the accepted and usual course of judicial proceedings. Sup. Ct. R. 10.

The Opinion of the Fourth Circuit Court of Appeals applied the controlling substantive law as set forth in *Franks v. Delaware*, 438 U.S. 154 (1978). The Petitioner has cited no procedural law from this court, or from other circuits, with which the Opinion conflicts, since the standard of review employed was that Petitioner's verdict could stand only if there was evidence upon which the jury could reasonably base its finding, after giving Petitioner the benefit of every legitimate inference in her favor. *Mays v. Pioneer Lumber Co.*, 502 F.2d 106 (4th Cir. 1974) citing

Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690, 82 S.Ct. 1404, 8 L. Ed.2d 777 (1962).

To the extent that Petitioner seeks review of the Fourth Circuit's ruling on the South Carolina common law tort of intentional infliction of emotional distress, she makes no claim that an important question of federal law is involved. The Fourth Circuit exercised its duty, as enunciated under the common law, "to determine whether, on the evidence before it, the (Respondent's) conduct may reasonably constitute outrageous conduct" and only then is a question presented for the jury. *Todd v. South Carolina Farm Bureau Mutual Ins. Co.*, 321 S.E.2d 602, 609 (S.C. App. 1984), *rev'd in part on other grounds*, 336 S.E.2d 472 (S.C. 1985).

The Fourth Circuit Court of Appeals Correctly Analyzed Petitioner's Procedural Due Process Claim, Which She Based Upon an Argument That There Was no Probable Cause For Her Arrest

The Petitioner's case was devoid of any facts sufficient to state a claim against Florence County, South Carolina. In order to establish the County's liability under 42 U.S.C. §1983, the Petitioner was required to establish that the entity at issue is a "moving force behind the deprivation." *Polk County v. Dodson*, 454 U.S. 312, 326 (1981) (quoting *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978)). Consequently, the entity's

"policy or custom" must have played a part in the violation of federal law. *Oklahoma City v. Tuttle*, 471 U.S. 808, 817-818 (1985).

> As this Court stated in *Monell*:
> [A] local government may not be sued under [42 U.S.C.] §1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by it or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government, as an entity, is responsible under [42 U.S.C.] §1983.
>
> *Id.*, quoting 436 U.S. 658, 694.

Barry Elliott, County Administrator for Florence County, can fairly be said to be the Chief Executive Officer of Florence County and the particular official to whom Florence County has delegated policy-making authority. (Jt. App. 71). He was asked only three questions about the official policy or custom of Florence County:

> Q. Mr. Young testified in his deposition which was published to the jury that he had authority to write these pieces of paper, we'll call them tickets. For the County of Florence?
>
> A. Mr. Young has had the authority, matter of fact, prior to me becoming County Administrator. That was so, maintaining the rules and regulations at the Public Service Building, yes.

Q. You knew this was going on?

A. Yes, I did.

Q. And it was going on regularly. You new that Mr. Benton and Mr. Young would simply put these pieces of paper on people's cars?

A. Yes, sir. They had no way of knowing who those cars belonged to at that particular time.

(Jt. App. 73).

This was in reference to Young's deposition testimony:

Q. Do you recall whether that job description stated anything about giving tickets out or summons out or whatever you want to call them?

A. We were instructed by Florence County that we have the authority to write them. Of course, my Superintendent does it, which I can also write them, but my Superintendent of the Buildings do it because I'm not there all the time. But we have the authority given to us by Barry Elliott to write these parking tickets.

Q. Okay. Barry Elliott gave you the authority to write those tickets?

A. Yes, sir.

Jt. App. 58.

Thus, while the Petitioner may have succeeded in establishing that it was the official policy or custom of Florence County for LeGrand Young or other employees to write and place parking tickets on the windshields of cars, *that is not the conduct about which the Petitioner complains*. The Petitioner complains about having been arrested and alleges that the arrest arose out of a false statement made when she failed to appear in answer to the parking ticket.

The Petitioner's case strongly implies that the precise nature of the improper conduct is the signing of an affidavit in blank, with perhaps reckless disregard to what is going to be put in the blanks. Mr. Elliott was not questioned about, nor did the Petitioner otherwise establish, any official policy or custom relating in any way to the signing of affidavits, the signing of affidavits in blank, or any other action to be taken by any county employee, at any level, when people fail to appear in response to a parking ticket. Young's testimony on that point is undisputed:

Q. Have you arrested, have other people been arrested?

A. *This is the first one that's never shown up.*

Q. This is the first one that's gotten arrested?

A. To my knowledge.

(Jt. App. 87, emph. supp.)

The Petitioner simply failed to prove the policy or custom of Florence County regarding such arrests and thereby failed to establish an essential element of her §1983 claim.

The United States Supreme Court in *Daniels v. Williams*, 474 U.S. 327 (1986) ruled that negligent conduct is insufficient for a procedural due process violation involving a claimed deprivation of property. The *Daniels* court even held that more than negligence is required for all due process violations, even when they involve a claimed deprivation of liberty or property. Justice Rehnquist, in *Davidson v. Cannon*, 474 U.S. 344 (1986), held that the due process clause requires for its violation some abuse of governmental power and that negligent conduct does not constitute such an abuse.

All of Petitioner's arguments rely upon one central contention: Petitioner's belief that LeGrand Young falsely swore in an affidavit which led to her arrest when he swore she "received" a summons and when he cited §17015-90 of the South Carolina Code (*sic*). The Opinion below, at n.3, correctly held the uncontroverted facts established that the summons was placed on Mrs. Wilkes's vehicle, that her daughter received it and told her about it, and that Mrs. Wilkes was aware of all pertinent facts about the summons except what she intentionally failed to read, thus there was ample evidence to establish a reasonable belief that she had received it. As *Franks v. Delaware*, 438 U.S. 154 (1978) would require if one were to view the facts in a different

light and assume that Mrs. Wilkes did not receive the summons, every statement which the Petitioner contends to be false or misleading can be stricken from the affidavit and probable cause still exists. Deleting the reference to receiving the summons and deleting the statutory reference, Young's affidavit reads:

> I further state that there is probable cause to believe that (Gloria Turner Wilkes) did commit the crime (of failure to appear in court [magistrate]) and that such probable cause is based on the following facts: That on 11/10/89, the Respondent did fail to report to Magistrate Court as required by a summons ... for parking in a fire lane ... . Incident happened in the parking lot of the Florence County Public Service Bldg.
>
> Jt. App. 116.

Every word in contention, "that she received on 10/17/89" and "thus violating S.C. Code of Law #17015-90," being removed, the affidavit still establishes probable cause to believe Mrs. Wilkes unlawfully failed to appear in the Magistrate's Court.

The Petition relies heavily upon the argument that the 1992 enactment of S.C. CODE ANN. §56-7-80 (Supp. 1994) would be superfluous if Florence County had already possessed a means of enforcing its summonses. Paragraph (G) of §56-7-80 makes it clear, however, that the enactment of the statute "does not prohibit a county ... from enforcing ordinances by means otherwise authorized by law." Thus,

the statute contemplates enforcement mechanisms beyond those prescribed in it. Indeed, S.C. CODE ANN. §56-5-710(1) (1991) has been in effect, substantially unchanged, for decades and makes clear that Chapter 5 of Title 56 does not present local authorities from reasonably exercising their police power by "regulating the standing or parking of vehicles."

It is a violation of state law for a person to stop, stand, or park a vehicle "any place where official traffic-control devices prohibit" stopping, standing, or parking. S.C. CODE ANN. §56-5-2530(A)(1)(k), (A)(2)(f), and (A)(3)(b) (1991). An "official *traffic-control* device" is defined as any sign, signal, marking, or device placed or erected by authority of a public body "or official having jurisdiction" for the purpose of regulating, warning, or guiding traffic. S.C. CODE ANN. §56-5-540 (1991).

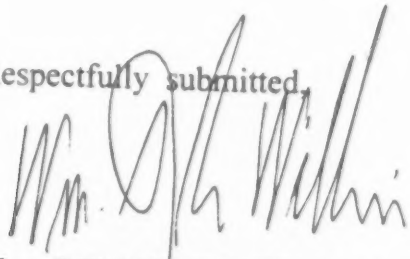
It is a misdemeanor for any person to violate the foregoing provisions of Chapter 5, Title 56. S.C. CODE ANN. §56-5-6190 (1991). Finally, and as recognized in the Fourth Circuit's Opinion at n.1, it is unlawful "for any person to do any act forbidden or to fail to perform any act required" by Chapter 5, Title 56. S.C. CODE ANN. §56-5-730 (1991). Since local authorities may act through their officials to control parking, it is simply unlawful for any person to disregard a summons; that is the offense which LeGrand Young stated, however unartfully, in his words to the magistrate and in his affidavit.

CONCLUSION

The Petitioner has not presented special or important reasons for granting certiorari in her case. The Fourth

Circuit Court of Appeals properly apprehended and analyzed the controlling law relating to procedural due process claims arising out of a contention that an arrest was based on less than probable cause. Questions of South Carolina common law present no important or significant considerations for this Court. Consequently, the Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,



Wm. REYNOLDS WILLIAMS
WILLCOX, McLEOD, BUYCK & WILLIAMS
Post Office Box 1909
Florence, South Carolina 29503-1909
(803) 662-3258

DATED: January 18, 1995.